Rethinking Reporter's Privilege

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RETHINKING REPORTER’S PRIVILEGE

RonNell Andersen Jones*

Forty years ago, in Branzburg v. Hayes, the Supreme Court made its first and only inquiry into the constitutional protection of the relationship between a reporter and a confidential source. This case—decided at a moment in American history in which the role of an investigative press, and of information provided by confidential sources, was coming to the forefront of public consciousness in a new and significant way—produced a reporter-focused “privilege” that is now widely regarded to be both doctrinally questionable and deeply inconsistent in application. Although the post-Branzburg privilege has been recognized as flawed in a variety of ways, commentators and scholars have largely ignored its most fundamental shortcoming: by making the reporter the nucleus of the constitutional inquiry, the Court has unnecessarily complicated an analysis that has a much more natural doctrinal starting point. This Article argues that the Court should abandon its reporter-based approach to confidential-source cases and replace it with a constitutional inquiry that focuses on the anonymous source. It suggests that analyzing confidential-source cases based on the anonymous-speech rights of sources rather than on the information-flow or newsgathering rights of the reporters will more fully acknowledge the scope of First Amendment interests at stake and will eliminate the need to define who is a “reporter” for purposes of the privilege—a task that has become complicated to a degree of near impossibility as technological changes alter the primary mechanisms for gathering and disseminating news.

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INTRODUCTION

Four decades ago, the U.S. Supreme Court made its first and only inquiry into what journalists see as the First Amendment issue most critical to the flow of information in our democracy: the degree of protection that should be afforded to newsgatherers who promise confidentiality to sources.

The case was *Branzburg v. Hayes*, and it was decided at a moment in American history in which the role of an investigative press—and of information provided to the press by confidential sources—was coming to the

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1. See James A. Guest & Alan L. Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 18 (1969) (“[N]ewsmen have . . . argued that courts should interpret the first amendment as giving a constitutional privilege to conceal sources in order to assure the free flow of news.”); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 Ohio St. L.J. 249, 261 (2004) (“[W]ithout protection of their sources, won’t information flows dry up and freedom of expression lose meaning?”).


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forefront of public consciousness in a new and significant way. First Amendment and media-law scholars of the day foresaw the indispensable function that journalists and their unidentified sources would play in revealing government corruption, uncovering corporate misbehavior, and illuminating injustices. But they also recognized the inherent complexity in striking a balance between the benefit of the anonymous provision of socially important information and the risk that confidentiality in newsgathering might impede future legal investigations—for example, if reporters later refused to share information perceived as critical to civil or criminal cases.

In response to these tensions, proposals developed for a so-called “reporter’s privilege”—a legal construct that, when successfully invoked, would make the news reporter an exception to “the longstanding principle that ‘the public...has a right to every man’s evidence.’” Now embodied in state law by statute, constitutional provision, court decision, or court rule in nearly all fifty states, the privilege permits a reporter, under defined circumstances, to

4. Investigative journalism had recently hit the mainstream and was becoming accepted as a legitimate form of news reporting. James L. Aucoin, The Evolution of American Investigative Journalism 18 (2005). Stories involving confidential sources gained a very high profile; they included the publication of the Pentagon Papers and the Washington Post’s coverage of the Watergate scandal, which broke the same year that the Court handed down the Branzburg decision and involved a confidential source. See N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Carl Bernstein & Bob Woodward, FBI Finds Nixon Aides Sabotaged Democrats, Wash. Post, Oct. 10, 1972, at A1.


7. Branzburg, 408 U.S. at 688 (quoting 8 John Henry Wigmore, Evidence in Trials at Common Law § 2192 (McNaughton rev. 1961)).

refuse to respond to a subpoena that seeks information the reporter received confidentially in the newsgathering process, and to avoid facing the contempt citation that might otherwise result from such a refusal. These laws, arising as they did from the heightened awareness of the admirable role of the investigative press, are largely tailored to serving that role. They presume that reporters need this unique treatment in order to fulfill their "public-serving function of producing important news stories." Thus, although both the reporter and the confidential source are essential to the widespread distribution of that publicly useful information, the doctrinal focus has almost exclusively been on the reporter.

Indeed, as the doctrine's very moniker makes clear, reporter's privilege laws aim to ensure the anonymous provision of socially important information by protecting the newsgatherer to whom that information is provided. The state statutory or common-law right belongs to the reporter herself—a privilege attached to a given occupational status, based on the public good produced by those holding that status.

It is perhaps no surprise, then, that when the Supreme Court in \textit{Branzburg} tackled the question of whether the privilege should be recognized as a federal constitutional matter, it conducted its First Amendment analysis through this same lens. In that seminal case, the petitioners asked the Court to acknowledge a First Amendment–based reporter's privilege—that is, to hold that the U.S. Constitution guarantees a reporter the right to keep the confidence of a would-be anonymous news source when the reporter is later subpoenaed to testify regarding the confidential information.12

\begin{flushleft}
\textit{and Pathological Perspectives, 71 OHIO ST. L.J. 1, 57–59 (2010) (summarizing state law trends).}
\end{flushleft}


10. Jones, \textit{Media Subpoenas, supra} note 8, at 326 & n.28 (citing commentary making this argument).

11. See, e.g., \textit{ARIZ. REV. STAT. ANN.} § 12-2237 (2003) ("A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify . . . ." (emphasis added)); \textit{COLO. REV. STAT.} § 13-90-119(2) (2012) ("Nor shall a newspaper person, without such newspaperperson's express consent, be compelled to disclose . . . ." (emphasis added)); \textit{FLA. STAT.} § 90.5015(2) (2012) ("A professional journalist has a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source . . . ." (emphasis added)); \textit{NEV. REV. STAT.} § 49.275 (2011) ("No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose . . . ." (emphasis added)); \textit{TENN. CODE ANN.} § 24-1-208(a) (2000) ("A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required . . . . to disclose . . . . any information or the source of any information . . . ." (emphasis added)).

While the split decision in *Branzburg* narrowly refused to recognize such a privilege, a First Amendment–based reporter's privilege nonetheless was launched by the case, as federal courts in the wake of *Branzburg* expressed a willingness to acknowledge the qualified privilege proposed by the *Branzburg* dissent, at least in cases that were not on all fours with that case's facts. In this way, a constitutional reporter's privilege doctrine emerged that is now recognized in some form in nearly all federal jurisdictions. Again, the courts' inquiries center on the journalists' rights to gather news and report it, rather than on any rights of the would-be anonymous sources.

What has emerged post- *Branzburg* is a doctrine that is uniformly regarded as confusing, resulting in a “privilege” that is ambiguous, inconsistent, and the subject of significant criticism. And although the post- *Branzburg* privilege has been recognized as flawed in a variety of ways, commentators and scholars have largely ignored what may be its

13. A narrow majority insisted “that reporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.” *Id.* at 690–91.

14. See Jones, *Media Subpoenas*, supra note 8, at 346 & n.111 (listing cases in which “federal circuit courts gave a media-generous reading to *Branzburg*”).

15. See, e.g., *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 163 (2d Cir. 2006) (“[T]he rights a newspaper or reporter has to refuse disclosure in response to a subpoena extends to the . . . reporter’s telephone records . . . .” (emphasis added)); *United States v. Criden*, 633 F.2d 346, 357 (3d Cir. 1980) (referencing “[t]he journalists’ privilege” and the “right for a newsman to refuse to answer relevant and material questions asked during a criminal proceeding” (emphasis added)); *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972) (referencing “a journalist’s right to protect confidential sources” (emphasis added)).


17. McDonald, supra note 1, at 254 (noting that newsgathering law is inconsistent).

18. See, e.g., Paul Marcus, *The Reporter’s Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 836 (1984) (“Even a thorough reading of the four opinions in the *Branzburg* case will not lead to an absolutely certain understanding of the holding in the one Supreme Court decision that dealt with the notion of reporter’s privilege.” (footnote omitted)); Genevra Kay Loveland, Comment, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440, 1462 (1975) (“As a result, their opinions [in subsequent cases about the public’s right to know], like *Branzburg*, are contradictory and confusing. After generously bestowing first amendment status upon newsgathering, they seem fearful of venturing too far.”).

19. See, e.g., Blasi, *The Checking Value*, supra note 5, at 602 (“One can only be dissatisfied with the current state of Supreme Court doctrine regarding newsgathering. In effect, the Court has failed to accord the newsgathering interest the full measure of favorable procedures, presumptions, and substantive doctrines that normally follow from the determination that a particular interest is truly of First Amendment pedigree.”); McDonald, supra note 1, at 253 (“[J]udges complain[] about the ‘unsettled’ and ‘fuliginous’ nature of the legal principles in
most fundamental doctrinal shortcoming. By making the reporter the nucleus of the constitutional inquiry, the Court has unnecessarily complicated an analysis that has a much more natural doctrinal starting point, and in so doing has produced a test that is both unprincipled and impractical.

This Article argues that the Court should abandon its reporter-based approach to confidential-source cases and replace it with a constitutional inquiry that focuses on the source whose name or other identifying information the reporter seeks to keep anonymous. Analyzing confidential-source cases based on the anonymous-speech rights of sources, rather than on the information-flow or newsgathering rights of the reporters, will have at least three salutary effects. First, it will eliminate the need to define who is a "reporter" for purposes of the privilege. Second, it will enable the Court to abandon its complex and necessarily speculative investigations into how great a contribution the press makes to public dialogue (and what degree of privilege is necessary to ensure that continued contribution), and allow it to draw instead upon deeply rooted and well-defined principles regarding the protection of anonymous speech, which have been acknowledged since the nation's founding. Finally, and perhaps most importantly, this approach will acknowledge the true breadth of interests and First Amendment values at stake in the confidential-source dynamic. It will allow the source to assert her own First Amendment rights, but it will also permit reporters to take advantage of third-party standing doctrine when—as is virtually always the case—the reporter argues for anonymous-speech rights that in fact belong to someone other than herself. In so doing, this approach will continue to recognize the First Amendment's public-information values and the vital role of newsgathering, but without slighting the theoretical importance of the individual-liberty interest of the original speaker. Indeed, a wave of recent cases involving media assertions of third-party standing in somewhat analogous circumstances highlights the workability of this approach. In these cases, involving anonymous comments about completed stories posted on online media sites, courts have already essentially embraced this sensible analysis.

Part I describes the historical trajectory and motives of the journalism industry that combined to lead the Court down a reporter's privilege path that considers the rights of the reporter rather than the rights of the speaker whose name the reporter refuses to reveal. It then addresses the analytical

20. See infra Section I.B.1.
21. See infra notes 181–184 and accompanying text.
22. See infra Section III.C.
23. See infra Section III.D.
drawbacks and practical complexities that this reporter-focused approach has produced.

Part II proposes a new doctrinal approach that considers the anonymous-speech rights of the reporter's source. It investigates the theoretical moorings for a robust protection of anonymous communicators and emphasizes the ways in which the Court, in developing this analytical rubric, has embraced two separate sets of First Amendment values—only one of which is recognized in the post-Branzburg framework.

Part III demonstrates the ways in which this anonymous-speaker approach, coupled with third-party standing for reporters, would produce greater doctrinal consistency than the current approach and would better strike the often-difficult balance between the virtues of the anonymous provision of socially important information and the risks of confidentiality impeding future legal investigations. Using the analogous online-speech cases as illustrations, it argues that adopting the anonymous-speaker approach in the larger realm of cases that currently employ the reporter's privilege doctrine would add uniformity to the law and better serve the true scope of First Amendment values that are at stake.

The Article's conclusion urges the Court to provide guidance that is more useful to reporters and sources and more consistent with overarching First Amendment norms by giving reporters third-party standing to assert the First Amendment anonymous-speech rights of their sources.

I. THE MOTIVATIONS FOR AND CONSEQUENCES OF THE BRANZBURG APPROACH

As described more fully below, by the time the question of protection of confidential sources reached the Supreme Court in Branzburg, it was already clear as a doctrinal matter that speakers enjoy a robust First Amendment right of anonymity; this analysis could have provided a logical and workable basis for the Court's First Amendment thinking on the confidential-source question. Yet the Court's inquiry in Branzburg—and the somewhat strained and deeply controversial privilege that developed from it—largely ignored this acknowledged set of rights. In assessing the validity and workability of shifting confidential-source doctrine to an anonymous-speaker approach, it is useful first to investigate both how the current approach came to be and what practical and doctrinal consequences it has produced. This Part describes the historical forces and litigation strategies that brought about today's post-Branzburg doctrine and then outlines the complexities that this doctrinal development has produced. It also explores the ways in which those complexities threaten the flow of important information to the public.

24. See infra Section II.A.

A. A Doctrinal Focus on the Reporter

At least two powerful forces combined to drive the Court's *Branzburg* doctrine in a reporter-centric direction that overlooks the rights of the speaker whose name the reporter refuses to reveal. First, a unique social and historical arc positioned legal scholars, attorneys, and the justices themselves at a vantage point that spotlighted the role of the press and the uniqueness of the reporter's contribution to public dialogue on important matters. Second, a set of news industry incentives tailored Supreme Court litigation choices and post-*Branzburg* developments in distinctly journalist-focused ways.

1. Historical Momentum

In the late 1960s and early 1970s, as the consolidated cases that would become *Branzburg v. Hayes* developed in the lower courts, a series of "developments in the journalism profession"26 heightened the public's sense of the media's importance and magnified the demand for both watchdog reporting and legal protections supporting those efforts.

In the wake of the watershed Pentagon Papers revelations27 and "[o]n the eve of such major journalistic accomplishments as the Watergate coverage,"28 the press found itself with a new, critical function of uncovering governmental malfeasance in the war in Vietnam and elsewhere.29 Increasingly self-identifying as enforcers of accountability in government in numerous ways, the media pressed for open-government laws,30 pushed back against closed and sometimes recalcitrant administrations,31 and took

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on a role as counterweights to government in a way never before seen.32 A surge in investigative reporting33 was accompanied by a surge in both the reputation of the press and the reliance on unnamed sources.34 The probing approach and confrontational attitude toward government—which always existed to some degree among the American media35—took on an entirely new vitality and “became, at least temporarily, the most conspicuous characteristics of a free press.”36 The result was a marked transition in how reporters perceived their own role. While in the 1950s “[m]ost journalists regarded themselves as no more than notetakers,”37 stenographically delivering government information to readers, throughout the 1960s an avalanche of aggressive journalism students produced a generation of young reporters who saw themselves as watchdogs.38

At this zenith of American journalism, legal scholars proposed that constitutional doctrines and statutory protections should expand to better protect the valuable institution of the press. Arguing that high-ranking officials increasingly “made a display of their contempt for truth” and flouted openness and accountability,39 scholars praised the media for their role in uncovering corruption and urged development of legal doctrines that would better enable such conduct. Perhaps most famously, Justice Stewart argued that the Founders drafted the Press Clause of the First Amendment with the recognition that a “free press meant organized, expert scrutiny of government.”40 Other scholars likewise pressed the Court

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33. Investigative journalism rose to such prominence during this time period that the Pulitzer Prize began to include a separate category for investigative reporting. Anderson, supra note 27, at 449 n.102.

34. See Blasi, The Newsman’s Privilege, supra note 6, at 252; see also Guest & Stanzler, supra note 1, at 43, 57-61 (quoting major newspaper editors describing the growing percentage of stories arising from confidential sources); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317, 330 (1970) (sharing press surveys on the number of stories based on confidential sources).


37. Aucoin, supra note 4, at 47.

38. Id. at 48.


to better “safeguard” the press and encouraged legislatures to develop “long overdue” laws to assist the “free news media designed to serve the public.” The momentum to protect the press through the law was palpable.

Public views of the media followed suit. The “Fourth Estate” role of the press in investigating and reporting governmental abuse was increasingly understood and publicly celebrated. As journalism became more and more committed to investigative work, public trust and confidence in the media soared. And when the reporters engaging in this investigative work found themselves increasingly subject to subpoenas requesting confidential-source identities, the public was inclined to protect them.

Given this unique and powerful moment in the history of the American press, it is little wonder that the complex and multifaceted questions of whether and how to protect the anonymous provision of information to a news reporter would be answered through a lens that focused on the media’s

41. Gordon, supra note 6, at 20.
42. Stewart, supra note 40, at 634 (“The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.”).
43. Lewis, supra note 39, at 76 (“[R]eporters are culture heroes and our cleanest-cut young people dream of being Woodward and Bernstein.”); see also Virginia Dodge Fielder & David H. Weaver, Public Opinion on Investigative Reporting, NEWSPAPER RES. J., Winter 1982, at 54, 57 (noting that 77.1 percent of the public describes investigative reporting as “very important”).
45. See Blasi, Newsmen’s Privilege, supra note 6, at 229–30.
role in a democracy and the value of confidential sources to investigative reporting.\(^47\)

2. The Litigation of \textit{Branzburg}

It was against this backdrop of increasing reliance on confidential sources and heightened focus on the media as a check on government that \textit{Branzburg}\(^48\) reached the Supreme Court. Indeed, the fact that the Court consolidated \textit{Branzburg} with two other cases demonstrates that, by 1972, the issue of how best to protect the press in its investigative work involving anonymous sources had come to a head. Along with \textit{Branzburg}—which itself comprised two separate appeals—the Court also decided \textit{In re Pappas}\(^49\) and \textit{United States v. Caldwell}.\(^50\) The consolidated cases, litigated by media companies and with the intense support of amicus press organizations,\(^51\) were understandably framed in journalist-focused ways and sought rights that would be exercised by the news reporter rather than by her source.

\textit{a. Branzburg, Pappas, and Caldwell}

The \textit{Branzburg} case began in late 1969 when Paul Branzburg, a reporter for Louisville’s \textit{Courier-Journal}, published an article revealing details about local drug manufacturing and distributing.\(^52\) Branzburg had written the article based on information obtained “during an interview granted to him upon a pledge” that he would not reveal the identity of the drug producers.\(^53\)

\begin{footnotes}
\item[47] See Blasi, \textit{Newsman’s Privilege}, supra note 6, at 235 (“The press subpoena controversy [was] in the courts . . . largely because the sensitivity to each other’s needs that [previously] characterize[d] government-press relations [was, by 1971,] virtually nonexistent.”).
\item[48] \textit{Branzburg} v. Hayes, 408 U.S. 665 (1972).
\item[49] 408 U.S. at 709, aff’g \textit{In re Pappas}, 266 N.E.2d 297 (Mass. 1971).
\item[50] \textit{Branzburg}, 408 U.S. at 708, rev’g Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).
\item[52] \textit{Branzburg} v. Pound, 461 S.W.2d 345, 345–46 (Ky. 1970), aff’d sub nom. \textit{Branzburg} v. Hayes, 408 U.S. 665 (1972). Judge Pound was succeeded in office by Judge Hayes, the named party in the case before the Supreme Court. 408 U.S. at 668 n.3.
\item[53] \textit{Pound}, 461 S.W.2d at 346.
\end{footnotes}
Accordingly, when he was subsequently subpoenaed to appear before a local grand jury, "Branzburg refused to disclose the identity of the men" who were the sources of his story. 54 Facing contempt charges, Branzburg asserted a statutory and constitutional privilege against testifying but was denied relief in his state's court of appeals. 55

Branzburg's troubles did not end there. Several months later, he was subpoenaed again in relation to another story that he published about drug activity in Frankfort, Kentucky. 56 Again, Branzburg asserted a privilege to protect the anonymous sources who had given him his story, 57 and again, he was unsuccessful. 58 Significantly, the state court explicitly avoided framing the First Amendment issue as one of "the protection of the petitioner's source of information"; rather, the question was focused on Branzburg himself—whether he, as a reporter, could "be required even to appear before the grand jury." 59

At roughly the same time, a photographer for a New Bedford, Massachusetts television station was fighting a similar subpoena in that state's court system. In 1970, Paul Pappas obtained access to a Black Panthers meeting on the condition that he agree to keep his sources anonymous and report only on the fact of the police raid. 60 Pappas was later summoned to appear before a grand jury but he refused to testify about certain matters, arguing that revealing information would violate his First Amendment right "to protect the source of information acquired in confidence." 61 Again, though, the litigating reporter 62 and the state court 63 focused on the confidential informants not as anonymous speakers per se but rather as sources of news from which Pappas himself asserted a right to obtain information.

54. Id.

55. The state court ultimately relied solely on the construction of Kentucky's reporter's privilege statute to reject Branzburg's claim that he was exempt from testifying. Pound, 461 S.W.2d at 346, 348. It found that Branzburg had "abandoned the claim of [F]irst [A]mendment privilege," id. at 346 n.1, but the Supreme Court disagreed, Branzburg, 408 U.S. at 671 n.6.

56. Branzburg, 408 U.S. at 669–70.


58. This time, the state court ruled on both the statutory and constitutional issues. Meigs, 503 S.W.2d at 749–50.

59. Id. at 750; see also id. at 751 (holding that the reporter's interest in gathering news did not outweigh the public's need for the evidence and rejecting "speculation" that requiring the testimony would "inhibit[ ] his ability to obtain information").


61. Id. (internal quotation marks omitted).

62. Id. at 299–300 (noting arguments centered on "the extent to which the First Amendment [protects] news gatherers" and describing the argument that "to force a newsman to testify . . . may impair the ability of a free press").

63. Id. at 302–03 (holding that "[a]ny effect on the free dissemination of news [would be] indirect, theoretical, and uncertain" and finding "no constitutional newsman's privilege . . . to refuse to appear and testify before a court or grand jury").
Finally, in the last of the cases consolidated with *Branzburg*, a federal district court judge held Earl Caldwell, a reporter for the *New York Times*, in contempt for ignoring a grand jury subpoena. Like Pappas, Caldwell had been subpoenaed to testify about activities carried out by the Black Panthers and refused on grounds that doing so would "destroy the relationship of trust" with his source and hamper his constitutional right to newsgather. When Caldwell challenged his contempt citation before the Ninth Circuit Court of Appeals, the court accepted the reporter-focused argument overturned Caldwell's contempt citation, and held that "[a]bsent compelling reasons for requiring [a reporter's] testimony, he [is] privileged to withhold it."

Thus, when *Branzburg* and its companion cases reached the Court, no one had formally presented or considered the issue of press subpoenas through the lens of the anonymous-speech rights of the reporters' sources.

b. The Briefs' Focus on the Reporter

This primary focus on the journalist continued at the Supreme Court, as the media companies that litigated *Branzburg* on behalf of their journalist employees crafted briefs calculated to serve their long-term industry interests, and as the amici—the lion's share of whom were other press entities and industry advocates—mirrored these approaches in their submissions to the Court. The parties and their amici focused on the newsgathering right

65. *Id.*
66. *Id.* at 1084.
67. *Id.* at 1085 ("[C]ompelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyse, and publish the news." (internal quotation marks omitted)).
69. Jones, *Litigation, Legislation, and Democracy*, *supra* note 30, at 571 (describing the motivations of newspapers as "legal instigators").
70. See *Branzburg*, 408 U.S. at 666–67 (listing organizations that filed amicus briefs); see also *supra* note 51 (specifying the amicus briefs filed by press entities and industry advocates).
71. See, e.g., Brief for Petitioner, Paul M. Branzburg at 3, *Branzburg*, 408 U.S. 665 (No. 70-85), 1971 WL 133354, at *3 (framing the Question Presented as "[w]hether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a newspaper reporter to disclose confidential information"); *id.* at 9, 1971 WL 133354, at *49 ("Newsgathering activities are essential to the effective functioning of a free press, and as such are protected by the First Amendment to the Constitution of the United States."); see also Reply Brief at 8–9, *Branzburg*, 408 U.S. 665 (No. 70-94), 1970 WL 122436, at *8–9 ("The gathering of news protected by the First Amendment is, at the very least, the right to be free from governmental restraints and inhibitions which destroy the newsman's confidential relationships and thus seriously restrict the information he obtains and that the public in turn is entitled to receive.... The right to gather... is... an intrinsic part of the entire process protected by the First Amendment under the general description, 'the freedom'... of the press.'") (final alteration in original) (emphasis added)).
72. See, e.g., Newspaper Guild Brief, *supra* note 51, at 6, 1971 WL 133339, at *6 ("A free press cannot serve the basic purpose of the First Amendment, to enlighten the people,
of the press and the associated right of the public to receive information. The litigants consistently classified the relevant constitutional right as the "right to gather news," and repeatedly cited the public-information role of the press as the First Amendment value to be served. To the extent that reporters were asserting rights as proxies for anyone else, it was on behalf of the readers of their newspapers, not the sources who wished to remain anonymous.

Amici supported this same approach, arguing that freedom of the press must be honored in order to create an informed citizenry and that "the press cannot inform the people unless its newsmen can maintain communication with news sources." The Branzburg briefing did not wholly fail to acknowledge the Court's anonymous-speech jurisprudence. But even in the instances in which the briefs affirmatively recognized the right to speak anonymously or highlighted the concerns that sources might have in being

unless it is an informed press.

73. E.g., Brief for Petitioner, Paul M. Branzburg, supra note 71, at 13, 1971 WL 133354, at *13 ("If the right to gather news is limited, then the right to a free press is correspondingly limited."); id. at 17, 1971 WL 133354, at *17 ("By interfering with the newsgathering process the state has made severe inroads on the fundamental freedoms guaranteed to the press ... ").

74. E.g., id. at 13, 1971 WL 133354, at *13 ("[T]he right of the public to receive the facts and information must be guarded . . . ."); id. at 22, 1971 WL 133354, at *22 (arguing that when reporters are forced to testify about anonymous communications, "the public loses an important source of news" (emphasis added)).

75. Brief of the ACLU et al., Amici Curiae at 3-4, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-57), 1971 WL 133338, at *3-4 [hereinafter ACLU Brief]; see also Washington Post Brief, supra note 51, at 15, 1971 WL 133330, at *15 ("[G]athering the news is as much protected by the First Amendment as is its dissemination. It is obvious that newsgathering depends in large part upon information given to reporters in confidence . . . ").

76. Newspaper Guild Brief, supra note 51, at 5, 1971 WL 133339, at *5; see also National Media Brief, supra note 51, at 7, 1971 WL 133333, at *7 ("The right of the public to be informed by print and electronic media, which is deeply rooted in the First Amendment, coincides with a reporter's right of access to news sources . . . ").

77. See, e.g., Brief for Petitioner, Paul M. Branzburg, supra note 71, at 26, 1971 WL 133354, at *26 ("State action which deprives an individual of the right to speak anonymously through the news media violates the First Amendment."); Washington Post Brief, supra note 51, at 18, 1971 WL 133330, at *18 ("[Th]e Court has repeatedly emphasized, in a variety of contexts, the value of anonymity in the collection and dissemination of information.").

78. See Brief for Petitioner, Paul M. Branzburg, supra note 71, at 26-27, 1971 WL 133354, at *26-27 ("By compelling the testimony of . . . reporters concerning their informants, and thereby discouraging these informants from speaking out, the state deprives these individuals of effective freedom of expression and the right to be heard."). Pappas's brief never mentions anonymity at all. Reply Brief, supra note 71, at 8-9, 1970 WL 122436, at *8-9 (focusing exclusively on the newsgathering right).
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identified, they did so in support of a First Amendment right for the reporter, arguing that many sources would speak to reporters only if given assurances that their confidentiality would be protected and that restricting these speakers “restrict[ed] and limit[ed] the freedom of the press.”

c. The Court’s Focus on the Reporter

Given this overwhelming focus on newsgathering by both the lower courts and the Branzburg briefs, it is unsurprising that the justices, too, viewed the issue of a reporter’s privilege almost exclusively through this lens. The majority framed the petitioners’ argument in only these terms, stating at the outset that “[t]he heart of the claim [was] that the burden on news gathering resulting from compelling reporters to disclose confidential information outweigh[ed] any public interest in obtaining the information.” It noted that it had been “admonished that refusal to provide a First Amendment reporter’s privilege [would] undermine the freedom of the press to collect and disseminate news,” and the Court’s focus remained almost entirely on the fact “that the privilege claimed [was] that of the reporter, not the informant.”

In refusing to acknowledge a First Amendment–based reporter’s privilege to protect anonymous sources, the majority stated that the need for effective grand jury proceedings outweighed “the consequential, but uncertain, burden on news gathering.” Likewise, it rejected the notion that “the public interest in possible future news about crime from undisclosed, unverified sources

79. See, e.g., Brief for Petitioner, Paul M. Branzburg, supra note 71, at 26–27, 1971 WL 133354, at *26–27 (“Jobs are threatened, economic security may be endangered, and official state action is often a result of individual expressions of minority views.”); ACLU Brief, supra note 75, at 11–12, 1971 WL 133338, at *11–12 (suggesting that, in speaking confidentially with reporters, political dissidents, low-level criminals, and government officials were “attempting to communicate their ideas to the public in an anonymous fashion”).


81. Id. at 20–21, 1971 WL 133354, at *20–21; see also ACLU Brief, supra note 75, at 11, 1971 WL 133338, at *11 (calling anonymous-speech protection “[a]nother set of established doctrines . . . bearing upon upholding a [reporter’s] First Amendment right to refuse to disclose confidential information”).

82. Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (emphasis added); see also id. at 679–80 (“[The reporters] press First Amendment claims that may be simply put: that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information . . . .”).

83. Id. at 698.

84. Id. at 695; see also id. at 682 (“This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.”).

85. Id. at 690 (emphasis added).
must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants.®

Although the narrow, five-justice majority in *Branzburg* held that the Constitution did not give rise to a privilege for the journalists on the facts of that case,®7 Justice Powell concurred separately and appeared to express sympathy for the very constitutional protections that the majority rejected.®8 Although less than clear in its contours, the concurrence did specifically state that “the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.”®9 This concurrence thus provided media attorneys with ammunition for arguing that “legitimate First Amendment interests require protection” in many confidential-source situations outside the grand jury setting at issue in *Branzburg*.® The arguments fairly quickly held sway in almost every federal appellate court across the country.® Sympathetic to the newsgathering needs of the wildly popular press and buoyed by Justice Powell’s suggestion that the dissent’s approach might sometimes be proper, nearly all federal courts came to recognize some constitutional privilege for journalists in non-grand jury cases.® Although support for this First Amendment–based qualified privilege is arguably declining,® and some have forecasted a trend away from recognizing it, this post-*Branzburg*, dissent-based development remains the strong majority position.® Thus, in real-world terms, the *Branzburg* dissent-

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86. *Id.* at 695. Indeed, in one of the few instances in which the majority did reference the anonymous-speech rights of sources, it minimized them by suggesting that “[t]he preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution.” *Id.* at 691. Though it later acknowledged that there may be “situations where a source is not engaged in criminal conduct,” *id.* at 693, the majority expressed doubt as to whether “the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime” would actually be deterred, *id.* at 695.

87. *Id.* at 665, 667.

88. See *id.* at 709 (Powell, J., concurring) (“The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.”).

89. *Id.* at 710.


91. For a list of cases embracing the argument that a First Amendment qualified privilege exists, see Jones, *Media Subpoenas*, supra note 8, at 346 & n.111.


93. See, e.g., McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (rejecting the widely accepted reading of *Branzburg* giving rise to a qualified privilege).

94. See United States v. Sterling, 818 F. Supp. 2d 945 (E.D. Va. 2011) (applying a reporter’s privilege to a journalist’s refusal to respond to a subpoena for the name of a confidential source and citing the strong majority reading of *Branzburg* as setting forth a qualified privilege).
ers, rather than the majority, set forth the meaningful First Amendment doctrine for federal courts on the question of the existence and contours of a reporter's privilege.95

In recognizing a constitutional qualified reporter's privilege, the dissenters—like the majority—accepted the journalist-focused doctrinal approach. They argued that the First Amendment dictated a rule that reporters do not have to respond to subpoenas asking them to "reveal confidences," but that this qualified privilege would be overcome if the government

(1) show[ed] that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of the law; (2) demonstrate[d] that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate[d] a compelling and overriding interest in the information.97

The dissenters fully embraced the argument that a reporter possesses a "right to gather news" and stressed the media's "constitutional mission" in declaring a reporter-based "right to a confidential relationship." Although far more willing than the majority to engage the case law on anonymous-speech rights,101 the dissenters still invoked this doctrine only tangentially. They saw the anonymous-speech rights as merely "analogous" to the issue at hand, and they portrayed actual anonymous speakers as relevant only insofar as they "make information available through the press to the public" and have "relationships [with protected reporters that] are vital to the free flow of information."104

Thus, it was natural for federal circuit courts, taking their lead from the Branzburg dissenters, to adopt an analytical framework focusing on the rights of the reporter herself and not those of the individual to whom the reporter had promised confidentiality.105

95. State courts have likewise created a privilege despite Branzburg's narrow rejection of it. See Jones, Empirical Study, supra note 8, at 590 & nn.28-29 (discussing the development of the privilege by state courts applying common law or federal or state constitutional law).

96. Ugland, supra note 8, at 2 n.1 ("As a result [of Justice Powell's concurrence], many lower federal courts have since recognized some form of the privilege, and many have endorsed the criteria outlined in Justice Stewart's Branzburg dissent.").


98. Id. at 728.

99. Id. at 729.

100. Id. at 728.

101. See id. at 735 (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462–63 (1958), and Talley v. California, 362 U.S. 60, 64 (1960)).

102. Id. at 735.

103. Id. at 730; see also id. at 744 (citing a need to "avoid deterrence of such sources").

104. Id. at 736.

105. See, e.g., United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986) ("[I]nformation may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant . . . ." (emphasis added)); LaRouche v.
B. The Doctrinal Aftermath of Branzburg

In the forty years since Branzburg offered the reporter–focused qualified constitutional privilege, judges,\textsuperscript{106} scholars,\textsuperscript{107} and even journalists themselves\textsuperscript{108} have repeatedly questioned the privilege's application and utility. This doctrinal framework—although arguably producing positive societal results and sustaining a culture of public-affairs reporting superior to what would exist in the absence of any privilege at all—has also produced significant complexity and confusion that warrants the exploration of alternative doctrinal approaches. Though the decision is criticized on numerous grounds,\textsuperscript{109} it is the twin intractable problems of definition and degree that make Branzburg and its progeny a particularly hazardous framework for the constitutional consideration of reporter–source relations. On the first of these problems, an approach that considers only the newsgathering and public-informing rights of the reporter creates an increasingly difficult and constitutionally questionable need to define who is a reporter for purposes of the privilege.\textsuperscript{110} The second problem is that this approach also rises and falls on the degree to which reporters meet their public-serving function and need the privilege to continue to serve that function—issues that are thorny as an analytical matter and impractical as an operational matter. A close investigation of Branzburg's foundations and of the ongoing analytical

\textsuperscript{106} See, e.g., McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003) (criticizing cases that cite Branzburg in support of applying a reporter's privilege).

\textsuperscript{107} See supra notes 16–19.

\textsuperscript{108} See Free Flow of Information Act 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary, 110th Cong. 29 (2007) [hereinafter Free Flow of Information Act Hearing] (testimony of William Safire, Chairman, The Dana Foundation) (“I am here as a journalist to testify from my real world that ‘a chilling effect’ . . . is being felt by today’s reporters and columnists.”); id. at 103 (prepared statement of the National Association of Broadcasters) (“It is myth to suggest that journalists will be able to unearth the information they need from sources when they must explain the procedures of a grand jury proceeding and a subpoena before every interview.”).

\textsuperscript{109} See supra notes 16–19.

\textsuperscript{110} Compare Sonja R. West, Awakening the Press Clause, 58 UCLA L. REV. 1025 (2011) (arguing for a narrow definition of the press and suggesting that the Press Clause is best read to establish press exceptionalism), with Eugene Volokh, Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today, 160 U. PA. L. REV. 459 (2012) (arguing that the Press Clause does not secure any rights exclusive to members of the organized media).
debates that surround the case’s application reveals the depth of these complexities and underscores the need for a more stable alternative framework.

1. The Need to Define “Reporter”

By its very designation, a constitutional reporter’s privilege applies only to a “reporter,” and thus mandates a threshold showing that the party seeking the constitutional protection qualifies occupationally for the privilege. Even assuming that this determination was one that could have fairly been made four decades ago—an assumption the Branzburg majority flatly rejected


112. Indeed, it may become increasingly difficult to tell whether a party is a reporter or a source. For example, when it accepted diplomatic cables and other information from an army soldier, WikiLeaks took on the features of a reporter; when information from the site appeared in the New York Times, WikiLeaks seemed more akin to a source. See Ginger Thompson, Competing Portraits in WikiLeaks Case, N.Y. TIMES, Dec. 23, 2011, at A15, http://www.nytimes.com/2011/12/23/us/hearing-in-private-mannings-wikileaks-case-ends.html.

113. See Mary-Rose Papandrea, Citizen Journalism and the Reporter’s Privilege, 91 MINN. L. REV. 515, 516–17 (2007) (“[T]he development of the Internet and online publications have raised a host of new, perplexing questions about the purpose and scope of the privilege.”).


115. David A. Anderson, Confidential Sources Reconsidered, 61 FLA. L. REV. 883, 903 (2009); see also Robert Kuttner, The Race: Newspapers Have a Bright Future as Print-Digital Hybrids After All—But They’d Better Hurry, COLUM. JOURNALISM REV., Mar./Apr. 2007, at 24 (discussing newspapers “with primarily online presence”).


117. State v. Buchanan, 436 P.2d 729, 731 (Or. 1968) (en banc) (“[I]t would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal-privileges and equal-protection concepts also found in the Constitution.”), quoted in Papandrea, supra note 113, at 574.
that factors such as the social or democracy-enhancing value of the disseminated information could be used to limit the privilege,\textsuperscript{118} these content-based determinations run the real risk of themselves violating the First Amendment.\textsuperscript{119} More to the point, a Court-declared delineation of this sort "as a matter of First Amendment interpretation would fly in the face of more than two hundred years of constitutional wisdom," because "[t]he idea of defining or 'licensing' the press in this manner is anathema to our constitutional traditions."\textsuperscript{120} Thus, while perhaps expected and even appropriate when designing the contours of a reporter's privilege as a statutory matter,\textsuperscript{121} this definitional line drawing is at best knotty as a basis for a constitutional doctrine.

On the question of specificity, judges faced with applications of the reporter's privilege have repeatedly bemoaned the "vexing nature of [the] question" of who would be entitled to a reporter's privilege.\textsuperscript{122} Judges have noted, in particular, that "[t]he proliferation of communications media in the modern world makes it impossible to construct a reasonable or useful definition of" a reporter.\textsuperscript{123} Judge Sentelle of the D.C. Circuit outlined the conundrum:

Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does

\textsuperscript{118}. See Papandrea, supra note 113, at 578 ("Some scholars have suggested that the reporter's privilege should be available only to those who publish information involving matters of public concern . . ."); Randall P. Bezanson, The Developing Law of Editorial Judgment, 78 Neb. L. Rev. 754, 760 (1999) ("[T]he press's claim to freedom is strongest when its speech is a product of a process of judgment that is . . . grounded in a reasoned effort to publish information . . . judged useful and important for the maintenance of freedom in a self-governing society.").


\textsuperscript{122}. In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1156 (D.C. Cir. 2005) (Sentelle, J., concurring).

\textsuperscript{123}. Wen Ho Lee v. Dep’t of Justice, 401 F. Supp. 2d 123, 140 (D.D.C. 2005) ("Reporters cannot be readily identified. . . . Without more definition for those entitled to invoke a reporter's privilege . . . it can hardly be said that such a privilege would be certain or narrowly drawn.").
the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not?224

Faced with this technological moving target, scholars and jurists have spilt gallons of ink setting forth proposed definitional approaches, ranging from exceptionally narrow classifications that would essentially include only professional journalists at established traditional media outlets,125 to very broad ones that would extend the privilege to any person performing the basic functions of a reporter.126 Some courts addressing the definitional issue in "cases involving traditional media entities have been so worried about the expansive scope of the privilege that they have been throwing the baby out with the bathwater and refusing to recognize the privilege at all."127

It is no exaggeration to say that the "futility of trying to decide as a matter of constitutional law who should have the right to protect confidential sources" is "[t]he most compelling objection to" a constitutional reporter's privilege with a Branzburg journalist focus.128 All told, if the only

124. In re Grand Jury Subpoena, Judith Miller, 438 F.3d at 1156–57 (Sentelle, J., concurring).


126. See Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998) ("Academicians ... should be accorded protection commensurate to that which the law provides for journalists.... After all, scholars too are information gatherers and disseminators."); Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) ("The critical question for deciding whether a person may invoke the journalist's privilege is whether she is gathering news for dissemination to the public."); von Bulow v. von Bulow, 811 F.2d 136, 144–45 (2d. Cir. 1987) ("[T]he protection from disclosure may be sought by one not traditionally associated with the institutionalized press ... ."); Linda L. Berger, Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication, 39 HOUS. L. REV. 1371, 1411 (2003) ("[A]ny individual engaged in journalism should be protected by journalists' shield laws."); Papandrea, supra note 113, at 519–20 ("Given ... the purpose behind the reporter's privilege, the privilege should not be limited to those who are serving as traditional journalists ...."); Dan Paul, Why a Shield Law?, 29 U. MIAMI L. REV. 459, 461 (1975) ("It would be a terrible mistake to draw shield legislation so narrowly that it would apply only to reporters."); Stone, supra note 120, at 51 (arguing that the answer to who should be the beneficiary of a reporter's privilege "should be a functional one").


constitutional framework available for assessing the flow of confidential information to the public is one that focuses on the reporter, the doctrine is destined to be mired in definitional difficulties in at least some cases, and likely in a growing number of them.

2. Difficulty of Weighing the Deterrence Factor and Assessing the Necessary Scope of the Privilege

A related and equally difficult doctrinal snag in an approach that focuses on the reporter is the analytically intrinsic need under such an approach to determine the necessity and scope of the privilege. Would "[t]he full flow of information to the public protected by the free-press guarantee . . . be severely curtailed if no protection . . . were afforded to the process by which news is assembled and disseminated?" Or would the absence of a reporter-based privilege in fact pose no "impediment to the free flow of information" of a degree that would justify the costs of the privilege?

As discussed above, the arguments built by the litigants in Branzburg, which formed the foundation of the qualified reporter-focused privilege that emerged after that case, had several component parts. Under this framework, the true value to be served is availability to the public of information about matters of import. In order for the privilege as constituted post-Branzburg to be mandated by the First Amendment, it must be the case that the absence of the privilege impedes public dissemination of that information—that is, that without the privilege, sources will not speak to reporters and reporters will not convey matters of import to the public. The difficulty of making each of these judgments is significant. Indeed, it was the core hurdle that the Branzburg majority could not clear. The majority was openly skeptical in its assessment, saying that it "remain[ed] unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury," and suggesting that the "evidence fail[ed] to demonstrate that there would be a significant constriction of the flow of news to the public" in the absence of a constitutional privilege.

Noting that "[e]stimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative," the majority found that "[r]eliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury."
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Post-Branzburg, the debates over these questions of necessity and degree have raged on in courts,134 in Congress,135 and among scholars.136 Supporters of the privilege insist that anecdotal evidence, common sense, and at least some empirical data all suggest that the privilege is vital to our system of investigative and watchdog reporting.137 They believe that without such protection for journalists, sources will in fact “dry up.”138 Chilling critically important speech on governmental and societal matters.139 Opponents argue the exact opposite: that both historical experience and common sense

134. Eliason, supra note 128, at 395 (“The Circuit Courts of Appeal are in disarray . . . over the extent to which a privilege exists.”); Jones, Empirical Study, supra note 8, at 591–93 (chronicling the tension between McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003), and courts that have adopted comparatively “journalist-friendly readings of Branzburg”).


136. Jones, Media Subpoenas, supra note 8, at 321 n.14, 323 (discussing extensive scholarship on reporter’s privilege).

137. See, e.g., In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1170 (D.C. Cir. 2005) (Tatel, J., concurring in the judgment) (“[S]pecial counsel presumes that leaks will go on with or without the privilege. . . . [T]he available evidence suggests the special counsel is wrong.”); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 84–85 (1975) (“Forcing reporters to divulge . . . confidences would dam the flow to the press, and through it to the people, of the most valuable sort of information . . . .”); Rachel Smolkin, Uncharted Terrain, AM. JOURNALISM REV., Oct./Nov. 2005, at 32, 34 (“Confidential sources and newsrooms have noticed [subpoenas to journalists], and what has resulted is a chilling effect . . . . Confidential sources have retreated, newsrooms have become wary and the free flow of information to the public has been impoverished.” (quoting a position paper that the Newspaper Association of America circulated on Capitol Hill)).

138. Comm. on Commc’ns & Media Law, Ass’n of the Bar of N.Y.C., The Federal Common Law of Journalists’ Privilege: A Position Paper, 60 RECORD 214, 225, 227 (2005) (“Without the ability of reporters to use these types of sources, many stories would have gone unreported. . . . Important information the public relies upon would simply dry up.”); Dalglish & Murray, supra note 90, at 14 (“If [reporters] are perceived as being an agent of discovery for a plaintiff, a prosecutor, or a defendant, who will trust them? Ultimately, sources will dry up and journalists will not be able to do their jobs.”); Lori Robertson, Kind of Confidential, AM. JOURNALISM REV., June/July 2007, at 26, 33 (quoting Lance Williams, a San Francisco Chronicle investigative reporter who was threatened with jail time for refusing to respond to a subpoena, as saying, “If we don’t get a shield law, it will eventually shut down sources” (internal quotation marks omitted)).

139. Free Flow of Information Act Hearing, supra note 108, at 13 (statement of Rep. Mike Pence) (“Without the promise of confidentiality, many important conduits of information about our [g]overnment will be shut down.”); see also Jones, Empirical Study, supra note 8, at 666 (“Subpoenas to the media are issued with some regularity; they are not limited to the media organizations or the substantive issues involved in the highest-profile recent cases; and, at least in some categories, they appear to be on the increase.”); Jones, Media Subpoenas, supra note 8, at 393 (“The breadth and depth of the qualitative and quantitative data demonstrate that both the threat and the reality of subpoenas alter behaviors in newsrooms of all sizes.”).
suggest that the privilege is largely unnecessary, and that the empirical data is at best inconclusive and at worst indicates that no reporter’s privilege is required for effective investigative newsgathering to continue. Given that the analysis requires “prov[ing] the negative”—that in the absence of the privilege, fewer sources with socially valuable information come forward and fewer reporters endeavor to do meaningful investigative work—the challenge of knowing which group has the better argument is a considerable one.

Thus, on the questions of whether a reporter-based privilege is necessary to ensure the flow of public information and if so, to what degree, there appear to be only two true grounds for agreement: that “none of these things is readily measurable” and that the seemingly necessary determinations are “daunting” or “well-nigh impossible” for courts to make with any precision, as courts are institutionally “ill-suited” to such tasks.

Combined, the definitional difficulties and inherent speculation about the necessity of the privilege and degree of protection required to serve its constitutional goals have led to divisions of opinion among lower courts and have made the exclusively reporter-focused approach to the protection of material from anonymous sources doctrinally unstable.

140. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 698–99 (1972) (rejecting the argument that “refusal to provide a First Amendment reporter’s privilege will undermine the freedom of the press to collect and disseminate news” by noting that historically, without a privilege, “the press has flourished”); Law Enforcement Hearing, supra note 130, at 16 (statement of Steven D. Clymer, Professor, Cornell Law School) (arguing that the “impediment to the free flow of information” without a privilege is “a hard case to make” and that “people are going to make leaks whether or not there is Federal protection for anonymous sources”); 153 Cong. Rec. 27,301 (2007) (statement of Rep. Lamar Smith) (“[F]or 200 years in this Nation, the press, in fact, has flourished [without a privilege]. Information has flowed freely.”); Douglas E. Lee, Do Not Pass Go, Do Not Collect $200: The Reporter’s Privilege Today, 29 U. Ark. Little Rock L. Rev. 77, 97 (2006) (citing use of confidential sources for stories on Watergate, the Clinton impeachment, and the Enron and Abu Ghraib scandals as “logical inconsistencies in the ‘chilling effect’ argument”).

141. See, e.g., Lillian R. BeVier, The Journalist’s Privilege—A Skeptic’s View, 32 Ohio N.U. L. Rev. 467, 468 (2006) (highlighting the “weak empirical foundations” for the privilege and arguing that “the extreme consequences [press advocates] forecast were the privilege to be denied seem most unlikely to eventuate”); Eliason, supra note 128, at 417–18 (“[V]irtually every judicial and academic discussion concerning the privilege proceeds from the assumption that this ‘chilling effect’ exists . . . . [I]t is impossible to prove empirically.”).


143. Ugland, supra note 8, at 45–46.

144. Wen Ho Lee v. Dep’t of Justice, 401 F. Supp. 2d 123, 139–40 (D.D.C. 2005); see also BeVier, supra note 141, at 475–76 (“[W]e are simply awash in indeterminacy about the impact that recognizing or not recognizing a reporter’s privilege would actually have.”).

145. Wen Ho Lee, 401 F. Supp. 2d at 139; see also Tucker & Wermiel, supra note 128, at 1321–22 (“[Y]ou can try to measure it, but empirically it is virtually an impossible task . . . .”).

146. See Eliason, supra note 128, at 395–96 (describing varying approaches in different circuits).
Instability in this area of the law is deeply problematic, and not merely because it is inconvenient to have governing standards that are less than tidy doctrinally. In the realm of expressive freedoms, clarity is crucial. Particularly when, as is the case with the reporter’s privilege, the doctrinal dividing line marks the difference between constitutional protection on the one hand and punishment—in the form of a contempt citation, fine, or jail time—arising out of expressive activity on the other, we should expect this line to be precise enough that the relevant actors can understand what conduct is protected and what conduct is not. Freedoms of expression are “delicate and vulnerable, as well as supremely precious in our society,” and because “[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions,” precision and intelligibility in the governing standard are essential.

Courts and scholars have long recognized these risks under the post-Branzburg approach. Indeed, whatever else can normatively be said about the need for or desirability of a privilege, it is undoubtedly true that both practical considerations and the demands of the First Amendment dictate that the relevant players have a sure knowledge as to whether the privilege does or does not exist in a given information-gathering circumstance. Uncertainty of application of the constitutional reporter’s privilege “leads to confusion by sources and reporters, and the specter of jail and other harsh penalties for reporters who do not know what promises they can make to their sources when engaged in newsgathering.” Likewise, when would-be anonymous speakers “are making difficult decisions about whether to put themselves at risk by revealing information of significant value to the public, clear rules are essential.”

Branzburg’s reporter focus does not provide this clear guidance. Federal courts of appeals, struggling with “a standard which is fraught with ‘imponderables and contingencies that themselves may inhibit the full
exercise of First Amendment freedoms,' have issued decisions on the scope and applicability of the privilege that, understandably, are "inconsistent, uncertain and irreconcilable." Because the reporter-focused privilege grew out of a generous reading of a concurrence, and, even more significantly, because it came laden with ongoing unknowables as to definition and degree, a reporter might not know if she actually possesses the qualified, contingent right in a particular circumstance. It should come as little surprise, then, that this "phantom privilege" has created "chaos in the lower federal courts about the extent to which the First Amendment embodies a journalist-source privilege." Reporters and their sources find themselves governed by a "patchwork of differing privilege rules depending on the jurisdiction in which they are subpoenaed," which leads to "arbitrary and conflicting outcomes." The uncertainty has become particularly apparent in the wake of what some have described as a recent pushback against the logic of the Branzburg dissent and against the overarching validity of a constitutional reporter's privilege. Judges are questioning the privilege more closely, and a series of notable cases in the last several years has cast journalists in the losing role in privilege disputes in federal courts. Although many of these cases have involved grand jury proceedings and thus were doctrinally predictable losses under Branzburg, some commentators suggest that "the sheer weight

155. See supra notes 109–114 and accompanying text.
157. Stone, supra note 120, at 45.
158. Petition for Writ of Certiorari, supra note 151, at 26, 2005 WL 1123536, at *26; see also Stone, supra note 120, at 45 ("The current state of affairs leaves sources, journalists, prosecutors, and lower federal courts without any clear guidance, and the scope of the First Amendment-based journalist-source privilege differs significantly from one part of the nation to another.").
159. See, e.g., Dalglish & Murray, supra note 90, at 39 (arguing that "the media has lost much of the ground it gained since Branzburg" and forecasting a possible "end to any judicial respect afforded to a federal reporter's privilege developed under the First Amendment").
160. See, e.g., id.
161. See, e.g., In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2005); In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004); In re Grand Jury Subpoenas, 438 F. Supp. 2d 1111 (N.D. Cal. 2006); Wen Ho Lee v. Dep't of Justice, 287 F. Supp. 2d 15 (D.D.C. 2003), aff'd in part and vacated in part, 413 F.3d 53 (D.C. Cir. 2005); see also Jones, Empirical Study, supra note 8, at 615 ("Beginning in approximately 2002, a firestorm of headlines emerged as reporters' battles—and ultimate losses—were placed in the public spotlight in a way that had not been seen for at least three decades.").
of negative precedent may make it increasingly difficult for journalists to defend the privilege even when the facts are more in their favor.\footnote{162}{Anthony L. Fargo, \textit{The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists and the Uncertain Future of the Federal Journalist's Privilege}, 14 WM. & MARY BILL RTS. J. 1063, 1111 (2006).}

Operating in this band of legal ambiguity,\footnote{163}{See id. ("[T]he ad hoc nature of privilege law since 1972 has made it less than predictable. . . ").} journalists report that they perceive their environment to be tentative and risky.\footnote{164}{Brief Amici Curiae of ABC, Inc., et al. in Support of Petitioners at 5, \textit{Miller v. United States}, 545 U.S. 1150 (2005) (Nos. 04-1507, 04-1508), 2005 WL 1199075, at *5 [hereinafter ABC Brief (Miller)] ("Today, reporters and their potential sources operate in a far more uncertain and risky environment as a result of the approach to the reporters' privilege taken by the federal courts . . ."); Jones, \textit{Media Subpoenas}, supra note 8, at 375 ("Both quantitative and qualitative data signal a deep discouragement on the part of editors and news directors, who . . . overwhelmingly perceive that . . . courts have become less protective of the media, prosecutors and civil litigants have become more willing to subpoena the press, and the frequency with which subpoenas are issued to news organizations has increased.").}

Parties to recent cases,\footnote{165}{E.g., Brief of Appellants Judith Miller, Matthew Cooper and Time, Inc. at 46, \textit{In re Grand Jury Subpoena, Judith Miller}, 438 F.3d 1141 (Nos. 04-3138, 04-3139, and 04-3140), 2004 WL 4957264, at *46.} scholars,\footnote{166}{Reporters' Privilege Legislation: Issues and Implications: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 164-65 (2005) [hereinafter Issues and Implications Hearing] (prepared statement of Geoffrey R. Stone, Professor, University of Chicago Law School); Tucker & Wermiel, supra note 128, at 1321-22.} and proponents who have testified before Congress seeking supplemental protection through a better-defined \textit{statutory privilege} all have strongly asserted that the result of ambiguity in this area is a chilling effect that is "as inimical to the principles of the First Amendment as direct censorship by the state."\footnote{167}{Free Flow of Information Act Hearing, supra note 108, at 64 (testimony of Jim Taricani, Investigative Reporter, WJAR/NBC10 Providence, New Bedford, R.I.) ("Sending reporters to prison for protecting their sources results in a chilling effect on the press."); id. at 29 (testimony of William Safire, Chairman, The Dana Foundation) ("Believe me, when a journalist is threatened with jail or, indeed, is jailed for refusing to blow the whistle on a whistleblower or to betray a trusting source, he or she feels a coercive chill.").} Not knowing if the protection exists, the argument goes, reporters and their sources will err on the side of caution and assume that it does not,\footnote{168}{Brief for Petitioner, Paul M. Branzburg, supra note 71, at 23, 1971 WL 133354, at *23.} thus shutting down speech that otherwise would and should flow freely.

The dynamic is made all the more complicated by the existence of often-very-strong reporter's privilege statutes at the state level. States enact these statutes with a plain goal of preserving the flow of information to the public through confidential sources. But the efficacy of even the most protective of
state legislative privileges is heavily undercut by the existence of an unclear or difficult-to-administer federal constitutional scheme. The uncertainty of the reporter-based federal constitutional doctrine "frustrates and defeats the nearly unanimous policies of the States in this area." Thus, once again, "the degree to which confidential sources could be protected [is] rendered uncertain, thereby lessening the likelihood that such sources will cooperate and undercutting the very benefit to the public [that virtually all states] sought to bestow through [their] shield law[s]."

Reporters argue that the major harms produced from all this confusion are harms to the public. "Journalists who fear that they may be subpoenaed to testify or give up their notes, forcing them to choose between their professional ethics or risk going to jail, may decline to do certain types of stories"—especially those "derived from confidential sources likely to be sought by prosecutors or civil litigants"—and ultimately it is the public that will be robbed of the newsworthy materials that it might have received. When potential sources, aware of the confused state of affairs on the privilege, are "deterred from speaking to the press," it is the public that does not hear the information that they have to offer. Thus, the sum total of these incentives is a "barrier to the free flow of information to the public."

Plainly, there is First Amendment value in newsgathering. The American press plays a critical role in educating, informing, and enlightening the pop-

170. Petition for Writ of Certiorari, supra note 151, at 26, 2005 WL 1123536, at *26 ("In the end, differing standards defeat the very purpose of the privilege, as a state-law privilege is of little value if it offers no reliable protection from forced disclosure in federal court.").

171. Id. at 9, 2005 WL 1123536, at *9; see also Jones, Empirical Study, supra note 8, at 656 ("When a reporter engages in newsgathering and is faced with the question of whether to promise confidentiality, she . . . cannot know what legal standard might ultimately operate upon that moment. In the absence of a federal privilege, even a reporter operating under a state shield law with an absolute privilege can make no guarantees to sources at the times in which those guarantees are sought.").


173. Free Flow of Information Act Hearing, supra note 108, at 64 (2007) (statement of Jim Taricani, Investigative Reporter, WJAR/NBC10 Providence, New Bedford, R.I.) ("Every time a reporter or news organization doesn't do a story because of fear of being held in criminal contempt, it is the public that loses."); see also ABC Brief (Miller), supra note 164, at 5, 2005 WL 1199075, at *5 (arguing that the "uncertainty" in the reporter's privilege "threatens to jeopardize the flow of information to the public").

174. Anthony L. Fargo, The Journalist's Privilege for Nonconfidential Information in States with Shield Laws, 4 COMM. L. & Pol'y 325, 328 (1999); see also Free Flow of Information Act Hearing, supra note 108, at 106 (letter from Denise A. Cardman, Acting Director, American Bar Association) ("The absence of a clearly defined federal reporters' privilege is affecting . . . editorial decisions, which in turn affects the free flow of information to the public.").

175. Tucker & Wermiel, supra note 128, at 1323.

176. Gonzales v. NBC, 194 F.3d 29, 35 (2d Cir. 1999).

Its efforts to investigate and report on social trends, government actions, and democratic decisionmaking are constitutionally vital. But, in light of the doctrinal complexities just discussed, two points bear emphasis: First, a constitutional analysis of the reporter–source dynamic that focuses on the reporter’s newsgathering right has proven incapable of fully serving that newsgathering right or of meeting the larger goal of preserving the flow of important information to the public. Second, newsgathering is not the only First Amendment value implicated by that reporter–source dynamic. As demonstrated in the next section, the anonymous-speech rights of the speaker also deserve fuller consideration and protection.

II. An Anonymous-Speech Analysis

A generation ago, the Supreme Court in *Talley v. California* made explicit something that had long been presumed about our First Amendment jurisprudence: in addition to having a freedom to speak, we also have a freedom not to disclose our identity when we do so. The *Talley* Court noted that “[t]he obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government.” It emphasized that the right to speak anonymously was a vital component of our democracy because “[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.” In subsequent opinions, Supreme Court justices have stressed both that the Framers considered a right to speak without identifying oneself to be foundational and

178. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572–73 (1980) (plurality opinion) (discussing the role that newsgatherers play as “surrogates for the public” and the ways in which the press contributes to “public understanding of the rule of law” (quoting Neb. Press Ass’n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in the judgment) (internal quotation marks omitted)); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) (“Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”)).


180. *Talley* v. *California*, 362 U.S. 60, 65 (1960); *see also* NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958) (“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association . . . ”); *Thomas v. Collins*, 323 U.S. 516, 540 (1945) (“We think a requirement that one must register before he undertakes to make a public speech . . . is quite incompatible with the requirements of the First Amendment.”).

181. *Talley*, 362 U.S. at 64.

182. *Id.*

that it continues to be a fundamental right housed within the First Amend-
ment’s Speech Clause.\textsuperscript{184}

The constitutional protection of anonymous speakers should be the
primary doctrinal focus in cases of anonymous speech to reporters.\textsuperscript{185} This
Part sets forth the theoretical foundation already established by the Supreme
Court for protection of speakers who desire anonymity, the risks associated
with acknowledging a strong right of anonymous speech, and the balance
the Court has struck in favor of speakers in this area. Part III will then
discuss the ways in which this anonymous-speech doctrine, which has
heretofore been focused on other factual settings, could be applied in
relatively seamless fashion to establish a speaker-focused protection of news
sources who wish to remain confidential. Given the probability of third-party
standing, this approach would retain the ability of newsgathering
organizations to protect First Amendment values, as they assert the
anonymous-speech rights of their sources. But it also would allow for the
consideration of critically important First Amendment values beyond the
newsgathering value and would largely eliminate the uncertainties and
complexities that have plagued the reporter-focused post-\textit{Branzburg}
approach. In preparation for that discussion, this Part articulates additional
underlying values that the Court itself has found are safeguarded through
recognition of the anonymous-speech right. An understanding of these
values—and of the central First Amendment doctrines that have animated
the development of the anonymous-speech right—will demonstrate that
grounding the confidential-source inquiry in the more stable anonymous-
speech doctrine (1) would better align the constitutional analysis to the
fuller Speech Clause issues at stake in the confidential-source situation,
and (2) would invite courts to apply a clearer constitutional framework with
which they already have expertise.

\textbf{A. Anonymous-Speech Doctrine}

In articulating the doctrinal contours of the right to speak anonymously,
the Supreme Court has stressed the First Amendment value of ensuring a
flow of information to the public.\textsuperscript{186} This emphasis makes clear that the
anonymous-speech right exists, at least in part, to meet the same important
societal ends that the post-\textit{Branzburg} reporter’s privilege seeks to meet.\textsuperscript{187}

\textsuperscript{184} Id. at 342 (majority opinion); Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam).

\textsuperscript{185} This Article focuses exclusively on this anonymous-source context. Other rights
that have sometimes been bundled under the generic term “reporter’s privilege”—including
the right not to turn over notes or other newsgathering materials not generated through any
confidential relationship—may well prove worthy of protection under other constitutional
considerations but are analytically distinct from the source-speech right that is the focus here.

\textsuperscript{186} See, e.g., McIntyre, 514 U.S. at 357; Talley, 362 U.S. at 64.

\textsuperscript{187} See \textit{Branzburg} v. Hayes, 408 U.S. 665, 715 (1972) (Douglas, J., dissenting)
(“\textit{E}ffective self-government cannot succeed unless the people are immersed in a steady,
robust, unimpeded, and uncensored flow of opinion . . . .”); id. at 725 (Stewart, J., dissenting)
That is, both approaches recognize and are driven by what might be called "public-information" values. But the anonymous-speech approach also recognizes and is driven by what might be called "individual-liberty" values. An investigation of the development and operation of the anonymous-speech doctrine plainly demonstrates the wider scope of First Amendment values served by the anonymous-speech right—and the clearer position that such a right occupies within the First Amendment framework.

Public-information values have been carefully enunciated by the Court in anonymous-speech cases. When the Court first set forth the anonymous-speech doctrine in *Talley*, the historical argument in support of anonymous-speech protection was centered on a free-flow-of-information premise: the First Amendment must protect anonymous distributions of literature in order to ensure that certain literature will in fact be distributed.\(^{188}\) The petitioner in *Talley* was a civil rights activist who had distributed unsigned handbills in Los Angeles calling for a boycott of merchants that he claimed sold goods manufactured by companies that discriminated against minorities in hiring.\(^{189}\) When charged under a city ordinance forbidding the distribution of anonymous handbills,\(^{190}\) Talley challenged the law as an unconstitutional abridgement of the freedom of speech.\(^{191}\)

Writing for a six–three majority, Justice Black agreed that the ordinance was void on its face and stressed the importance of anonymous speech in ensuring dialogue on "public matters of importance."\(^{192}\) Explaining that the Court had long recognized that "identification and fear of reprisal might deter perfectly peaceful discussions,"\(^{193}\) the *Talley* Court stated that there could "be no doubt that [the] identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."\(^{194}\) Setting forth numerous examples of ways in which anonymous communications "played an important role in the progress of mankind"\(^{195}\)—including the publication of the constitutionally foundation-al Federalist Papers under fictitious names\(^{196}\)—the Court observed, "It is

(**The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public.**).
plain that anonymity has sometimes been assumed for the most constructive purposes."^{197}

Thirty-five years later in *McIntyre v. Ohio Elections Commission*,^{198} the Court reaffirmed Talley's vibrant protection of anonymous speech when it declared unconstitutional^{199} a law prohibiting the distribution of anonymous campaign literature.^{200} The Court held that "[a]n author generally is free to decide whether or not to disclose his or her true identity."^{201} The *McIntyre* Court found that a citizen who distributed handbills at public meetings opposing a school tax referendum and signed them "CONCERNED PARENTS AND TAX PAYERS," rather than with her own name,^{202} had a constitutional right to do so, notwithstanding the state's countervailing interests in helping voters assess validity and reduce fraud.^{203} The provision of the Ohio Code forbidding anonymous speech was struck as unconstitutional,^{204} with the Court again insisting that under the First Amendment, speaking anonymously "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent."^{205} It underscored the public-information values of anonymous speech by citing the long tradition of influential authors writing anonymously or pseudonymously—including Mark Twain, O. Henry, Benjamin Franklin, Voltaire, George Eliot, and Charles Dickens^{206}—and by noting the importance of ensuring that information is not self-censored when speakers fear "economic or official retaliation," "social ostracism," or loss of privacy.^{207}

Thus, the Court squarely recognized that protection of anonymous speech advances the First Amendment's public-information goals of encouraging community-serving information and increasing the contributions willingly made to the marketplace of ideas.^{208} First Amendment scholars and jurists

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197. *Talley*, 362 U.S. at 64.
198. 514 U.S. at 334.
199. *McIntyre*, 514 U.S. at 357.
200. Section 3599.09(A) of the Ohio Revised Code provided, in relevant part, that "[n]o person shall write, print, post, or distribute . . . a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications . . . unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of [the author or head of issuing organization]." *McIntyre*, 514 U.S. at 357.
201. Id. at 341.
202. Id. at 337.
203. Id. at 348–53.
204. Id. at 357.
205. Id.
206. Id. at 341 & n.4.
207. Id. at 341–42.
208. See id. at 342 ("[T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.").
have noted that removing barriers to the flow of information has the large-scale societal benefits of enriching discourse and enhancing democratic self-governance. It is the way that the First Amendment serves the many by protecting the one.

Importantly, though, the case law makes clear that this set of public-information values represents only half of the dual purposes served by protecting anonymity in communications. Constitutional protection of anonymous speech also advances the First Amendment’s individual-liberty goals, facilitating the overarching “purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” The freedom to speak anonymously, in other words, is designed to serve the one even when it does not serve the many, by acting as “a shield from the tyranny of the majority.” It appears that the Court’s motivation for protecting anonymous speech has thus gone beyond eliminating obstacles to individual communication of publicly useful information, and has additionally embraced the self-fulfillment and individual-autonomy goals of the First Amendment “by enabling individuals to explore new ideas, new means of expression, and even new identities” and by allowing some speakers simply to “derive internal satisfaction from not having their true identity revealed.” This protection allows a speaker to ensure that readers will not


210. See, e.g., Mills v. Alabama, 384 U.S. 214, 219 (1966) (calling free speech the mechanism that the Framers chose to “improve our society and keep it free”); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); Stromberg v. California, 283 U.S. 359, 369 (1931) (remarking that free discussion is “essential to the security of the Republic” and a “fundamental principle of our constitutional system”); Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 93–94 (1948) (“[T]he principle of the freedom of speech is derived ... from the necessities of self-government ....”); Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 883 (1963) (“The crucial point ... is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government.”).

211. McIntyre, 514 U.S. at 357.

212. Id.

213. See, e.g., C. Edwin Baker, Autonomy and Free Speech, 27 Const. Comment. 251, 259 (2011) (arguing that the “most appealing” First Amendment theory views “the constitutional status of free speech as required respect for a person’s autonomy in her speech choices”); Emerson, supra note 210, at 879–81 (describing the “individual self-fulfillment” theory that man “finds his meaning and his place in the world” through the development of the powers of thought and expression, and that suppression of expression is thus “an affront to the dignity of man, a negation of man’s essential nature”); Lidsky & Cotter, supra note 209, at 1568 (“Anonymous speech is sometimes said to promote individual autonomy and self-fulfillment ....”).

prejudge her message simply because they like or dislike its proponent, and thus works a direct, individual-liberty benefit upon the speaker herself.

In recognizing these ways in which anonymous speech is valuable in preserving individual liberty of expression, the *McIntyre* Court gave an additional doctrinal justification for finding government interference with anonymity unconstitutional: it is strongly analogous to content control. Decades of First Amendment jurisprudence have firmly established that content-based regulations of speech ordinarily receive strict scrutiny. Unless the government can prove that a content-based regulation on speech is the least restrictive means of meeting a compelling governmental interest, the regulation will fail constitutional review.

Writing for the Court in *McIntyre*, Justice Stevens noted that governmental demands for a speaker's name run entirely afoul of this foundational First Amendment command in both a theoretical and a practical way. First, identification requirements essentially force the speaker to reveal "the content of her thoughts on a controversial issue," thus forcing the conveyance of content that the speaker did not wish to convey and conflicting with the essential theoretical underpinnings of the prohibition on content-based regulation. Second, and more concretely, such requirements literally force the inclusion of additional text—the speaker's name—when the speaker had made the editorial judgment to exclude it. "Accordingly," Justice Stevens wrote, "an author's decision to remain anonymous, like other decisions concerning the omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre* thus reinforced the individual-liberty values at stake in a decision to speak anonymously and cemented the right to speak anonymously as a logical, even necessary, component of the most foundational of First Amendment doctrines.

Although *Talley* and *McIntyre* are widely regarded as the core cases on the central question of the anonymous-speech right, the Court has recognized variations of the right in a number of other contexts, including cases

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216. See id. at 357.
218. Republican Party of Minn., 536 U.S. at 774–75.
220. Lidsky & Cotter, *supra* note 209, at 1543 ("In essence, the [*McIntyre*] Court treated the decision to remain anonymous as an editorial judgment like any other, which makes choosing to omit one's name no different than choosing to omit an opposing viewpoint or to include serial commas.").
in which groups or their members were required to disclose their memberships and cases in which speakers were required to obtain named permits before engaging in their communicative activity or were required to wear identification badges while engaging in that activity. The Court has consistently asserted the importance of the same anonymity values addressed in the core cases. Most recently, in Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, the Court reiterated the central tenets of the anonymous-speech doctrine in the context of an ordinance that required an individual engaging in door-to-door advocacy to display a permit showing the individual’s name. The Court criticized the permit obligation for forcing the “surrender of [the speaker’s] anonymity” and highlighted the privacy, source-bias, and retaliation concerns that have been recognized in other anonymous-speech cases. Despite the fact that a door-to-door speaker would of course reveal her physical appearance to the homeowner and thus never preserve total anonymity, the Watchtower Court spoke in strong terms about the right not to share one’s name or identity and about the potential chilling effect of the ordinance on those who may wish to canvass anonymously for unpopular causes. Importantly, then, even in instances in which total anonymity is not guaranteed, the Court has protected the right to speak without connecting one’s name to one’s message.

B. Potential Perils of Anonymous Speech

To be sure, this vibrant defense of anonymous communication is not cost free. As the Court in each of the above cases acknowledged, and as scholars have continued to explore, strong anonymity protection creates

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223. See, e.g., Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 165-67 (2002); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 183, 198 (1999) (striking down a Colorado requirement that ballot-initiative-petition circulators wear an identification badge bearing the circulator’s name, noting the judiciary’s obligation “to guard against undue hindrances to political conversations and the exchange of ideas,” and pointing to the “reluctance of potential circulators to face ... recrimination and retaliation”).  

224. Bates, 361 U.S. at 524 (holding that a statute mandating public disclosure of NAACP membership list would be upheld “only upon showing a subordinating interest which is compelling”); Patterson, 357 U.S. at 463 (noting that only a compelling interest would be “sufficient to justify the deterrent effect” that the forced disclosure of NAACP membership would produce).  

225. 536 U.S. at 154 & n.1, 155 & nn.2–3.  

226. Id. at 166–67.  

227. Id.  

228. Id. at 164–65 (noting that the Village of Stratton could legitimately attempt to prevent fraud and crime); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995) (noting the risk that anonymous speech will be abused to “shield[] fraudulent conduct”); Talley v. California, 362 U.S. 60, 64 (1960) (acknowledging interests in combating fraud and libel but noting that the ordinance at issue was not limited to that speech).  

the risk that a speaker will shield her identity for less-than-noble purposes or that the absence of attribution will lead to audience confusion. "serve as a cloak for the progenitor of irresponsible ideas," or enable outright lies. Obviously, removing an attribution of the source removes a sometimes-useful tool for evaluating the message. Listeners and readers "rely on author identity to reduce the search costs involved in sorting and interpreting the constant barrage of messages they receive," and requiring identification of a source might well "advance the search for truth by permitting a more critical evaluation of facts, figures, and arguments presented." Without this attribution, audiences are left with the communicative equivalent of a generic product, unable to use brand name as a proxy for qualitative judgments. Indeed, speakers with poor reputations may have every incentive to hide

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230. See, e.g., Saul Levmore, The Anonymity Tool, 144 U. PA. L. REV. 2191, 2193 (1996) ("Anonymity may encourage honest communication, but ... it may also stimulate dishonest, corrupt, or simply socially undesirable decisionmaking or communications."); Amy Constantine, Note, What's in a Name? McIntyre v. Ohio Elections Commission: An Examination of the Protection Afforded to Anonymous Political Speech, 29 CONN. L. REV. 459, 469–70 (1996) ("[D]isclosure ... serves to protect the subject of the speech. Arguably an individual has a right to be informed about who is criticizing him or speaking against him, truthful or otherwise."); Sherri L. Eyer, Comment, From Whence It Comes—Is the Message More Revealing Than the Messenger? McIntyre v. Ohio Elections Comm’n, 115 S. Ct. 1511 (1995), 100 DICK. L. REV. 1051, 1066–67 (1996) ("[I]ndividuals would be less likely to attach their names to malicious leaflets than to positive materials.").

231. See Kreimer, supra note 229, at 87 ("Abstracting from authorship is a willful sacrifice of relevant, and perhaps vital, information.").

232. Disclosure and the Devil, supra note 229, at 1109.

233. See Levmore, supra note 230, at 2193 (noting that anonymity may "stimulate dishonest, corrupt, or simply socially undesirable decisionmaking or communications"); Constantine, supra note 230, at 469–70 ("[A] person who is required to put his name to a document is much less likely to lie than one who can lie anonymously.").

234. Kreimer, supra note 229, at 78 (arguing that identification of those who “participate[] in public debate ... would provide the facts for accurate decision-making, and also avoid covert manipulation”); Disclosure and the Devil, supra note 229, at 1111 (noting the argument that “the volume and skill of modern propaganda make identification of the source of an argument essential to its evaluation”).

235. Lidsky & Cotter, supra note 209, at 1537.

236. Disclosure and the Devil, supra note 229, at 1111; see also Kreimer, supra note 229, at 87 (providing examples where the identity of the speaker might change how one examines an argument); Levmore, supra note 230, at 2194 ("Generally speaking, the value of identification ... is greater the more costly it is for the recipient independently to evaluate the accuracy of the communication.").

237. Lidsky & Cotter, supra note 209, at 1559; see also Kreimer, supra note 229, at 85 ("In one dimension, the identity of a speaker is a proxy for previous communications.").
their identities.\textsuperscript{238} Likewise, anonymity may be the path chosen by those who wish to spread falsity with impunity, "settle a personal score," "sow the seeds of discontent, or control public opinion."\textsuperscript{239} Anonymity can "shield speakers from liability for a variety of torts, including defamation, invasion of privacy, fraud, copyright infringement, and trade secret misappropriation."\textsuperscript{240} It can impede important investigations in civil and criminal matters.\textsuperscript{241}

Thus, although "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse,"\textsuperscript{242} for some or all of the reasons enumerated above, the Court has in some circumstances found that the government has in fact demonstrated a sufficiently important governmental interest in revealing the speaker's name.\textsuperscript{243} Indeed, even in cases that most broadly defined and most stringently applied the anonymous-speech right, the Court has kept open the possibility that compelling counterinterests may be shown in other cases.\textsuperscript{244} The \textit{McIntyre} Court noted that "the right to remain anonymous may be abused when it shields fraudulent conduct."\textsuperscript{245} It agreed that "[t]he state interest in preventing fraud and libel stands on a different footing."\textsuperscript{246} The \textit{Watchtower} Court highlighted the possible interests of "prevention of fraud," "prevention of crime," and protection of audience privacy\textsuperscript{247} as interests that, although not demonstrated in that case, might suffice in another. And it explicitly stated that governmental limitations on anonymity "may well be justified . . . by the special state interest in protecting the integrity of a ballot-initiative process or by the interest in preventing fraudulent commercial transactions."\textsuperscript{248}

Most notably, perhaps, in the distinctive setting of required disclosure of the identities of monetary contributors to political campaigns,\textsuperscript{249} the Court
repeatedly has upheld restrictions on anonymous speech. In *Buckley v. Valeo*, appellants challenged a federal statute requiring disclosure of the identities of individuals making contributions to political campaigns that exceeded certain monetary thresholds. The Court held that the interests of preventing "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions" sufficed to trump anonymous-speech rights, and it determined that the campaign disclosure requirements directly served those interests and "appear[ed] to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." Likewise, in *McConnell v. Federal Election Commission*, the Court addressed a challenge to the Bipartisan Campaign Reform Act ("BCRA"). Relying on *Buckley*, the Court upheld the requirement that purchasers of television advertisements advocating the election or defeat of a candidate for federal office disclose their identities, given the very strong interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." Though *Citizens United v. Federal Election Commission* overruled many aspects of *McConnell*, it is significant that it did not invalidate the disclosure requirements of BCRA.

Although scholars have criticized this isolated line of cases as inconsistent with the larger anonymous-speech doctrine—and the debate continues as to whether constitutional values are in fact best served by forcing disclosure of contributors' identities—it is notable that the Court in each of these cases continued to explicitly recognize the strong right of

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*Id.*, a term that has proven somewhat opaque but that increasingly appears to be not as demanding as strict scrutiny. The standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976) (per curiam)). Still, the Court has emphasized that to withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008) (citation omitted).

250. 424 U.S. 1, 62-63 (1976) (per curiam).
252. *Id.* at 66-68.
253. *Id.* at 68.
257. Lidsky & Cotter, *supra* note 209, at 1555 ("Even if *McConnell* and *McIntyre* are distinguishable, they have a deep theoretical inconsistency.").
258. See, e.g., Kreimer, *supra* note 229, at 6–8.
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III. APPLYING THE DOCTRINE TO CONFIDENTIAL NEWS SOURCES

Utilizing the anonymous-speech framework as the analytical structure for assessing the rights implicated in a confidential-source situation is both theoretically more coherent and practically more workable than the current post-Branzburg framework. Making this shift in lenses—from a focus on the reporter and her newsgathering right to a focus on the source and her right to speak anonymously—would be entirely consistent with the major premises and objectives of the Court’s anonymous-speech cases and would lack the drawbacks of the attractive-in-theory-but-difficult-in-practice post-Branzburg approach. This Part describes each of these benefits of the proposed shift. It discusses how the public-information values, including the newsgathering function, could continue to be defended under this approach, but it also highlights how housing the inquiry in the anonymous-speech rubric better positions the Court to consider additional individual-liberty values recognized by and enforced through the Speech Clause. Finally, it demonstrates the workability of the approach by discussing a similar application of the framework by courts in recent decisions dealing with the limited but closely analogous setting of anonymous online comments.

A. Utilizing the Anonymous-Speech Doctrine in a Confidential-Source Situation

A confidential source who does not wish to have her name revealed is analytically indistinguishable from any other author, writer, or speaker who wishes to convey information anonymously. Like the leafleteer in Talley who wanted the consuming public to know that merchants were selling

259. See, e.g., Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.").

260. E.g., id. at 44–45, 75 (explaining that the Court was required to apply a “strict standard of scrutiny” in reviewing the disclosure requirements); Citizens United, 130 S. Ct. at 914 (subjecting disclaimer and disclosure requirements to “exact[ing] scrutiny”).

goods produced through discriminatory labor practices\textsuperscript{262} but did not want that public to know that he was the source of the message, or like the concerned taxpayer in \textit{McIntyre} who wanted to present arguments against the tax referendum but did not want those statements linked to her by name,\textsuperscript{263} a confidential source offers information that she wishes to make public without attribution to her own identity for any number of reasons that the Court has acknowledged as valid.\textsuperscript{264} As such, the source should be entitled to protection under the anonymous-speech doctrine for statements made to a reporter in confidence.\textsuperscript{265}

As a purely technical matter, of course, the anonymous source has not kept herself totally unidentified. She has, in most instances, made herself known to the reporter for whom she has agreed to act as a confidential source.\textsuperscript{266} But because this communication occurs in a context in which confidentiality is demanded, guaranteed, and fully expected, it is in no sense an actual, public identification.\textsuperscript{267} Indeed, the dynamic that takes place when a confidential source approaches a reporter with information that she wishes

\begin{footnotes}
\footnote{262. Tailey v. California, 362 U.S. 60, 61 (1960).}
\footnote{263. \textit{McIntyre}, 514 U.S. at 337.}
\footnote{265. These situations are not precisely identical, of course, because the reporter’s source, unlike the speaker of the leaflet message, speaks through an intermediary who sometimes takes a more active role in translating the message, determining which portions of the information to include, and placing it within a larger context in a news story. Indeed, the reporter may do so in a way that is dissatisfying to the initial speaker. In truth, however, virtually all communication is mediated in some way. Leafleteers convey their message by way of a printer. Individuals who communicate online do so through an internet service provider ("ISP"). In choosing the mechanism by which her speech will be mediated, every speaker conducts a risk–benefit calculation. The source has presumably accepted whatever additional consequences come with mediating her communication through a reporter in exchange for the perceived benefits, which might include garnering a wider audience, gathering greater support for the message, and increasing the legitimacy that might attend a message delivered through this vehicle. The important common element for First Amendment analysis is that the source who speaks on condition of confidentiality has made a conscious choice in favor of anonymity. The Court has recognized the value of anonymous speech—to the substance of public debate and to the liberty interests of the speaker—without regard to the vehicle chosen to convey the message to listeners.}
\footnote{266. \textit{Branzburg}, 408 U.S. at 668, 673 (Branzburg “refused to identify the individuals he had seen,” and Pappas “refused to answer any questions about what had taken place” in order to “protect confidential informants.”). Truly anonymous-source situations do exist, such as a letter left in a newspaper’s mailbox or an untraceable phone call with a tip. However, it is rare for these types of sources to be cited in print because of reader skepticism of “the accuracy of reports involving confidential sources and . . . the motives of those who decline to go on record.” Jones, \textit{Empirical Study}, \textit{supra} note 8, at 651.}
\footnote{267. Importantly, as noted above, the Court has recognized that even partial revelation of one’s identity does not preclude a right to anonymity as to that which has not been revealed. \textit{See supra} note 227 and accompanying text.}
\end{footnotes}
to share anonymously is best viewed as the same as any other anonymous speaker’s selection of the mode of communication that she will use to distribute her message without attribution. The reporter and the newspaper are merely the vehicles by which the anonymous message will be distributed—the functional equivalents of the unsigned leaflet or handbill. Recognizing that the anonymous-speech rights of this speaker are equivalent to the rights of anonymous speakers in those other contexts comports with the Court’s view of the press as an agent of public information\(^\text{268}\) and with the basic First Amendment principle that a speaker is free to choose not only the content of her message but also the manner by which she shares it.\(^\text{269}\) Indeed, if the flow of information to the public is a major value underlying the anonymous-speech right, as the Court has repeatedly suggested is the case,\(^\text{270}\) the anonymous speaker who selects a reporter and the associated media outlet as the vehicles for her anonymous speech may even more closely align with these doctrinal moorings than the handbill and leaflet distributors, whose cases created the doctrinal foundation. Although the Court has wisely avoided making a speaker’s level of protection contingent on a showing of any specified degree of actual public-information value, it is nevertheless telling that one’s audience is likely to be significantly enhanced when the chosen vehicle is a reporter rather than an anonymous handbill or leaflet.

Using the anonymous-speech rubric to decide questions arising out of the confidential-source situation would reduce or eliminate many of the most troublesome complexities that currently vex the post-\textit{Branzburg}, reporter-based rubric. An investigation of the anonymous-speech rights of a confidential source would pose no definitional problems because the approach, unlike that of \textit{Branzburg}, does not rise and fall on the nature of the speaker, the nature of the audience, or the value of the information communicated. The Court has drawn none of these distinctions in its anonymous-speech cases, instead posing as the threshold questions only whether there was a speaker who wished to convey a message without

\footnote{268. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572–73 (1980) (plurality opinion); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975); Estes v. Texas, 381 U.S. 532, 539 (1965) (“The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . .”), quoted in \textit{Branzburg}, 408 U.S. at 727 (Stewart, J., dissenting).}

\footnote{269. Regulations limiting the manner of speech are constitutional only if they are “justified without reference to the content of the regulated speech,” are “narrowly tailored to serve a substantial governmental interest,” and “leave open ample alternative channels” of communication. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Underlying this doctrine is a starting presumption in favor of speaker choice in the manner of communication. Only if there exists some governmental interest unrelated to the suppression of free expression may the government take steps to limit the choice of communicative mechanism. \textit{Id.} And never has the Court suggested that the mere existence of alternative avenues, standing alone, suffices to justify a limitation on a speaker’s choice of a particular manner of communication.}

\footnote{270. See, e.g., McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995); Talley v. California, 362 U.S. 60, 64 (1960).}
Nor would an anonymous-speech approach mire the inquiry in impossible investigations of necessity and degree as the post-Branzburg approach does. To be sure, both approaches are animated at least in part by the same sets of concerns—the risk of retaliation against the speaker, the desire to avoid source bias, the need to protect speaker privacy—and by the understanding that, in a system in which the government compels speaker attribution, people who have these concerns will self-censor speech that otherwise would freely flow.

The important difference is that Branzburg, which focuses exclusively on the newsgathering right of the reporter and the public-information values to be served by that process, turns on the existence of this chilling effect and the concomitant interruption to the flow of news. Conversely, under the anonymous-speech doctrine, the Court has indicated that the elimination of these barriers to communication and information flow is an aspiration to be served by protecting anonymous speech but has not described it as the guiding justification for the protection. Avoiding the deterrence of communication and the chilling of speech is an important First Amendment aim, but the Court has not suggested, outside the unique campaign finance context, that only speech that would genuinely be deterred in the absence of anonymity protection is deserving of this protection. The individual liberty to choose one’s own message and to be free from a government dictate as to the content of one’s communication, including the

271. See Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 165–68 (2002); McIntyre, 514 U.S. at 344; Talley, 362 U.S. at 64.

272. See Richard M. Cardillo, Note, I Am Publius, and I Approve This Message: The Baffling and Conflicted State of Anonymous Pamphleteering Post-McConnell, 80 Notre Dame L. Rev. 1929, 1949 (2005) (explaining the considerations motivating the protection of anonymous speech); infra note 284 (giving examples of these concerns being articulated under the post-Branzburg approach).

273. See, e.g., McIntyre, 514 U.S. at 357; Branzburg v. Hayes, 408 U.S. 665, 725–26 (1972) (Stewart, J., dissenting); Talley, 362 U.S. at 64.

274. Branzburg, 408 U.S. at 728 (Stewart, J., dissenting) (“The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality—the promise or understanding that names or certain aspects of communications will be kept off the record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power—the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.”).

275. Cf. Buckley v. Valeo, 424 U.S. 1, 74 (1976) (per curiam) (requiring those who wish for an exemption from disclosure requirements to show “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties”).

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attributiof one’s authorship, is a foundational First Amendment principle that requires no demonstration of ill effect or empirical showing of the creation of detrimental incentives. At least in cases of direct bans on anonymity, the Court has found a deprivation of the anonymous-speech right to be the functional equivalent of content control that receives strict scrutiny, and thus, unless the government can demonstrate that such a limitation is the least restrictive means of meeting a compelling governmental interest, it will fail constitutional review.

Finally, and importantly, unlike the moving doctrinal target of the post-Branzburg reporter’s privilege—which has been embraced to varying degrees and with varying consistencies in different circuits and different contexts, and which remains open to serious question and criticism about its proper scope and application—a focus on an underlying fundamental right would place the analysis of a reporter–confidential source situation within a longstanding, established framework of constitutional jurisprudence. Although, as is always the case in constitutional decisionmaking, stability of application in this new context would necessarily be developed over time, as precedent

See McIntyre, 514 U.S. at 342 (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”); see also Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (“The essence of this forbidden censorship is content control.”).

See McIntyre, 514 U.S. at 341–42.

Id. at 347.

It should be noted that although all the case law from the Supreme Court on the question of anonymous-speech rights (excluding those decisions in the unique area of campaign speech) and all the lower court case law applying that anonymous-speech doctrine to the subpoena context, see infra Section III.D, appear to be applying strict scrutiny, it is possible that the way in which the relevant subpoena law is statutorily structured might have an impact on the standard employed by courts when they are faced with an infringement of the anonymous-speech right. The Supreme Court cases in the area of anonymous-speech rights have all involved direct infringement of the right through statutory bans on speaking anonymously. See, e.g., McIntyre, 514 U.S. at 334 (striking down a direct ban on anonymous literature); Talley v. California, 362 U.S. 60 (1960) (striking down a direct ban on anonymous leafleting). It is possible that a generally applicable subpoena statute might be viewed as an incidental rather than direct infringement on anonymous speech, and thus there is a case to be made that intermediate rather than strict scrutiny would apply. See, e.g., United States v. O’Brien, 391 U.S. 367, 376–77 (1968) (holding that intermediate scrutiny applies when neutral laws create “incidental limitations on First Amendment freedoms”). None of the subpoena cases discussed in Section III.D distinguish the infringement of the right in these ways and all appear to be adopting the broader strict scrutiny framework. See infra note 370. This is perhaps because the analogy of forced speaker identification to content control is only one of the many theoretical moorings for the status of anonymous speech as a fundamental right, or perhaps because a statute authorizing a subpoena ad testificandum is viewed as a direct rather than incidental regulation of speech. In either event, a fundamental right to speak anonymously is unquestionably at stake when a subpoena is issued for the name of a confidential source; the existence of this right should constitute the starting point for the analysis of the propriety of unmasking the source, under already-established constitutional doctrines with contours that are significantly clearer than the ambiguous post-Branzburg approach.

See supra Part I.
was built and the interests that might suffice as compelling were investigated and enunciated, the framework itself would provide a core stability for this doctrinal growth that the post-Branzburg case law fundamentally lacks. This stability would provide guidance to courts that have been doctrinally adrift on the reporter's privilege question. Equally importantly, it would provide fairness and practical utility to those who are subjected to the law and are ordering their communicative decisions around it.282

B. A More Appropriate Recognition of the Values Served by Confidential-Source Protection

Beyond being less complicated to understand and apply, the anonymous-speech doctrine is a substantively better avenue for considering anonymity promises between a reporter and confidential source because it requires acknowledgement of the fuller scope of First Amendment values implicated by the reporter–confidential source dynamic. The newsgathering-only focus that emerged from Branzburg, although rightly aiming to enhance the flow of information to the public, is nevertheless myopic, in that it acknowledges only those public-information values and fails to recognize all of the relevant communicative players in that dynamic. The public and its information-flow needs are of course important. The reporter undoubtedly matters a great deal as the key communicator of that information to the public. But failing to doctrinally acknowledge the initial communicator in the dynamic—without whom none of the other First Amendment actors would have information to convey or receive—is an analytical lapse that should be remedied.

This remedy is readily available in the already existing First Amendment anonymous-speech doctrine, which would explicitly serve the dual individual-liberty and public-information values that are implicated when information is shared without author attribution. First, this approach would acknowledge the First Amendment’s individual-liberty objectives and squarely serve individual free-speech values that the post-Branzburg approach identifies obliquely, at best.283 It would require that the inquiry face head-on the values of speaker privacy, antiretaliation, and source bias that are only circuitously acknowledged in the Branzburg line of cases.284 This approach would also

282. See, e.g., Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (explaining that statutes inhibiting First Amendment freedoms that do not provide “ascertainable standards of conduct” impede individuals’ ability to lawfully order their activities); NAACP v. Button, 371 U.S. 415, 432–33 (1963) (citing vagueness and overbreadth as impeding fairness in the application of the law and limiting the exercise of First Amendment freedoms).

283. Compare McIntyre, 514 U.S. at 357 (describing how anonymous-speech protection serves the “purpose ... of the First Amendment ... to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society”), with Branzburg v. Hayes, 408 U.S. 665, 695 (1972) (arguing that even if some “informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to news- men if they fear identification,” this interest is weaker than the interest in prosecuting crime).

284. See Branzburg, 408 U.S. at 695 (acknowledging that exposure of an informant may threaten the informant’s “job security, personal safety, or peace of mind”); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595 (1st Cir. 1980) (“[T]here may be cases where
require recognition of the more fundamental First Amendment individual-liberty values of speaker autonomy and self-fulfillment,\textsuperscript{285} which simply do not manifest themselves in the \textit{Branzburg} line, despite a communication that always begins with an individual speaker.

Significantly, this shift of paradigm, although expanding the recognition of values to include individual First Amendment liberties, would not represent a shift \textit{away} from recognition of the First Amendment's public-information goals. Rather, it would provide a far superior doctrinal investigation of the concerns that are regularly expressed in reporter's privilege cases about incentivizing communications from source to reporter and then from reporter to the public.\textsuperscript{286} As the anonymous-speech cases have made clear,\textsuperscript{287} application of this line of precedent would continue to acknowledge the First Amendment's purposes of encouraging community-serving information, increasing the contributions willingly made to the marketplace of ideas,\textsuperscript{288} and enhancing self-governance with a deeper, richer discourse on matters of public import.\textsuperscript{289} These value arguments have been made for decades in support of assorted variations of the post-\textit{Branzburg} privilege for reporters,\textsuperscript{290} but giving them an analytical home in an already-established anonymous-speech rubric makes it clear that the values will receive their due attention and that the applicable doctrinal test has a legitimate place within the First Amendment edifice.

\textsuperscript{285} See supra note 213.

\textsuperscript{286} See \textit{Branzburg}, 408 U.S. at 720 (Douglas, J., dissenting) ("Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens.'').

\textsuperscript{287} See \textit{Talley v. California}, 362 U.S. 60, 64 (1960).

\textsuperscript{288} See \textit{McIntyre}, 514 U.S. at 342 ("[T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.'').

\textsuperscript{289} See supra notes 209–210 and accompanying text.

\textsuperscript{290} See, e.g., Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981) ("Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices.'"); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 596 (1st Cir. 1980) (noting the "potential harm to the free flow of information"); Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979) ("A journalist's inability to protect the confidentiality of sources . . . will seriously erode the essential role played by the press in the dissemination of information.'"); Silwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977) (noting that there is "an underlying public interest" in "publications which communicate to the public information and opinion"); Cervantes v. Time, Inc., 464 F.2d 986, 992 n.9 (8th Cir. 1972) ("[T]he free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality.'").
C. The Assertion of the Right by Either the Source or the Reporter

In shifting the focus to the anonymous-speech right, the approach proposed here should make clear that the source, as a protected speaker, may press her own rights in court. This may be increasingly important in the changing world of American journalism, as reporters and media outlets that once had the financial ability and industry cohesion to litigate confidential-source issues become less able or less willing to do so.\(^{291}\) While the \textit{Branzburg}-era media were exceptionally profitable and operated with aggressive litigation teams willing to vigorously defend constitutional principles that impacted the operation of the press,\(^{292}\) today’s newspapers are struggling to stay afloat, and the online entities that are replacing them may not possess the resources or inclination to press those rights.\(^{293}\) For these reasons, a move to a constitutional rubric that explicitly embraces the individual rights of the source could have a positive effect on the enforcement of the newsgathering public-information values.

Significantly, however, those individual litigants would not be the only potential enforcers of the anonymity right. Reporters and media companies that are financially able should continue to press the rights themselves. Rather than litigating these interests through the post-\textit{Branzburg} framework, reporters and the news organizations that employ them may be found to have third-party standing to assert the anonymous-speech rights of their sources. Although the Court has prudentially sought to limit the instances in which litigants are given standing to “vindicate the constitutional rights of some third party,”\(^{294}\) the rule disfavoring this kind of standing has “never been absolute.”\(^{295}\) In recent years, the Court has regularly exercised its discretion to allow third-party standing “whenever a practical impediment makes it difficult for a right-holder to assert her own rights and some relation exists between the right-holder and the party asserting third-party standing.”\(^{296}\) Both of those conditions are certainly satisfied in the reporter–confidential source dynamic. Accordingly, the adoption of the

\(^{291}\) See Jones, \textit{Litigation, Legislation, and Democracy}, supra note 30, at 617.

\(^{292}\) See id.

\(^{293}\) See id.

\(^{294}\) Barrows v. Jackson, 346 U.S. 249, 255 (1953); see also Powers v. Ohio, 499 U.S. 400, 410 (1991) (“In the ordinary course, a litigant must assert his or her own legal rights and interests . . . .”); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263 (1977) (“In the ordinary case a party is denied standing to assert the rights of third persons.”); Singleton v. Wulff, 428 U.S. 106, 113 (1976) (plurality opinion) (“Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.”).


\(^{296}\) Id. at 1359–60. Some justices have argued that the expanded scope that the Court has given to third-party standing in recent years is doctrinally unwise, but they are in the minority. See, e.g., Kowalski v. Tesmer, 543 U.S. 125, 135–36 (2004) (Thomas, J., concurring) (“[I]t is . . . doubtful . . . whether third-party standing should sweep as broadly as our cases have held that it does.”).
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1. Closeness of Relationship

Because the limitations on third-party standing “developed as a matter of judicial self-restraint,” the courts remain wholly free to “consider whether judicial review of a particular case would be prudent.” Where the “relationship of the litigant to the person whose right he seeks to assert” is such that the “enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue,” a court can be confident that the construction of the right “is not unnecessary” and that the litigant will be “fully, or very nearly, as effective a proponent of the right” as the actual holder of it. The relationship between reporter and confidential source is just such a relationship. The news-dissemination interests of the reporter are often tied nearly perfectly to those of the source, and the two parties thus have a symbiotic relationship grounded in constitutionally protected activity. Indeed, in granting common-law and statutory privileges to reporters in the last generation, courts and legislatures have repeatedly cited the closeness, the value, and

297. Although increasingly generous, the third-party standing doctrine remains a significant enough prudential limitation that it will bar assertions of the right by individuals with minor or insubstantial relationships with the would-be anonymous speaker or by those with no underlying interests of their own. See Powers, 499 U.S. at 410–11. This Article’s proposed approach, which does not require that the individual who promised confidentiality to the speaker be a reporter, could be expected to be invoked in other contexts and might be criticized for creating the potential for larger numbers of subpoenaed individuals to refuse to provide information on the grounds that the information was conveyed to them by a speaker who requested anonymity. The third-party standing rules might be expected to act as a meaningful brake on what might otherwise be a more sweeping scope of the approach, thus producing both doctrinal consistency and practical workability.


299. Singleton, 428 U.S. at 114 (plurality opinion).

300. Id. at 115.


303. See, e.g., MINN. STAT. ANN. § 595.022 (West 2010) (“The purpose of [the state shield law] is to insure [sic] and perpetuate, consistent with the public interest, the confidential
the constitutional interconnectedness of the relationship between the reporter and the confidential source as justifications for recognizing these nonconstitutional versions of the privilege. Many courts and legislatures have emphasized that the relationship is worthy of safeguarding by


304. See, e.g., In re Contempt of Wright, 700 P.2d at 48 (recognizing that the relationship between reporters and sources should be protected because the work that it produces is of “utmost importance”); Sprague v. Walter, 543 A.2d 1078, 1082 (Pa. 1988) (“Because our society is also one that encourages an open interchange of ideas between its members and seeks to maintain the free flow of such ideas to the media, there is [a] . . . strong societal purpose in fostering uninhibited disclosure between individuals and the media.”); In re Taylor, 193 A.2d 181, 185 (Pa. 1963) (calling statute granting a reporter’s privilege “a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press”); Senear, 641 P.2d at 1183 (noting that the relationship is valuable “[g]iven both the complex and diffuse nature of modern society, the need for citizens in a representative democracy to make considered judgments, and the increasing importance of journalists to convey information to citizens”).

305. See, e.g., Cont’l Cablevision, Inc. v. Storer Broad. Co., 583 F. Supp. 427, 433 (E.D. Mo. 1984) (“The rationale [for the reporter’s privilege] is akin to other privileges, such as the attorney–client privilege or the privilege of the government in a criminal case to withhold the identity of its informants.”); Anderson v. Nixon, 444 F. Supp. 1195, 1200 (D.D.C. 1978) (comparing the reporter’s privilege with the attorney–client and informant privileges); Wheeler v. Goulart, 593 A.2d 173, 181–82 (D.C. 1991) (per curiam) (agreeing with “cases which have noted the similarity between a reporter’s privilege and the attorney–client and informant privilege,” and explaining that “[b]oth the attorney–client and the informant privilege are inextricably tied to the free flow of information”); Payton v. N.J. Tpk. Auth., 691 A.2d 321, 331–32 (N.J. 1997) (describing “certain confidential communications [that are deemed to be] qualitatively different and thus deserving of an evidentiary privilege” and listing as examples the “newsperson’s privilege” along with the physician–patient, clergy–penitent, and attorney–client privileges); In re Knight-Ridder Broad., Inc. v. Greenberg, 511 N.E.2d 1116, 1118 (N.Y. 1987) (explaining that “the entire thrust of the Shield Law was aimed at encouraging a free press by shielding those communications given to the news media in confidence” and in this regard was similar to other privileges which are generally based on confidential relationships (citation omitted)); Sprague, 543 A.2d at 1082 (noting that the reporter’s privilege is akin to others involving “parties sharing a unique relationship” and citing the attorney–client, spousal, physician–patient, and priest–penitent privileges as examples); In re Taylor, 193 A.2d at 185 (noting that the value placed on protecting sources is the same “public policy” value long placed on various other relationships, including those with attorneys and clergy).

comparing it to other close relationships that warrant protection under testimonial privileges, such as attorney and client, clergy and penitent, and husband and wife. These aspects of the reporter–source relationship render it at least as close a relationship as, and arguably closer than, many relationships that the Court has found suffice for third-party standing.307

2. Practical Impediment

The courts have also suggested that a grant of third-party standing may require some showing that the ability of the third party to assert her own right is in some way compromised by a practical impediment.308 Given the source-bias, retaliation, and privacy concerns that the Court has recognized as inherent in identifying an anonymous speaker, a reporter asserting the rights of her source should have little difficulty demonstrating a “genuine obstacle”309 to the source’s own assertion of those rights or a “social stigmatization” in forcing this assertion.310 The source’s absence from court would not have a “tendency to suggest that his right is not truly at stake or truly important to him”,311 rather, it is explainable by the very reasons the anonymity is being sought.
Although courts can and do engage in John and Jane Doe lawsuits that endeavor to preserve the anonymity of a litigant, the reporter in many instances may be “the [anonymous-speech] right’s best available proponent.”\textsuperscript{312} The reporter herself is a key player with a news-dissemination goal and is thus impacted even more directly than many of the parties that the Court has recognized as acceptable surrogates in its third-party standing cases.\textsuperscript{313} Moreover, the confidential-source issue will most often arise in the course of a subpoena issued to a reporter, and protection of the reporter will be a necessary step in protecting the anonymous speaker, as the reporter almost always knows the speaker’s identity. If the constitutional norm “is to be implemented effectively, the Court may need to permit challenges by those well-situated to lodge them.”\textsuperscript{314} Indeed, courts have repeatedly acknowledged this principle by allowing third-party standing in closely comparable cases involving an arguable chilling effect on or anonymous-speech right of an initial speaker, coupled with a shared First Amendment interest by the party seeking standing.\textsuperscript{315} The Court has declared itself “free to draw upon a wisdom peculiarly judicial in character—to elaborate upon the meaning of constitutionally cognizable injury, and then to weigh considerations of policy”\textsuperscript{316} in deciding whether a given litigant should be able to assert a right belonging to another. The nature of the constitutional injuries at stake in a reporter–source dynamic and the weighty policy concerns that the potential revelation of a source implicates should lead a court to allow a reporter to assert the anonymous-speech right of her source. Permitting the reporter to do so in response to a subpoena seeking the source’s name will absolutely “further the values inherent in [the source’s anonymous speech] right”\textsuperscript{317} and will thus be in keeping with the Court’s clear trends in applying its own prudential limitations.

D. Anonymous Speech Online: A Useful Analogy

Recent developments in the analogous setting of attempts to unmask anonymous speakers online offer a potentially helpful illustration of both

\textsuperscript{312} Id.

\textsuperscript{313} See Note, Overbreadth and Listeners’ Rights, 123 Harv. L. Rev. 1749, 1749 (2010) (“The Supreme Court has permitted third parties to assert the legal rights of others who are their customers, clients, patients, jurors, and even voters.” (footnotes omitted)).

\textsuperscript{314} Fallon, supra note 295, at 1364; see also William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 246 (1988) (arguing that third-party standing cases should be seen simply as a “determination of whether plaintiffs have the legal right to enforce the duty in question,” with the “touchstone [being] the nature of the underlying right, and . . . whether a grant of standing will further the values inherent in that right”).

\textsuperscript{315} See Ashley I. Kissinger & Katharine Larsen, Untangling the Legal Labyrinth: Protections for Anonymous Online Speech, J. Internet L., Mar. 2010, at 1, 17 n.23 (listing examples of cases in which third parties were allowed standing).


\textsuperscript{317} Fletcher, supra note 314, at 246.
how the third-party standing analysis proposed here might be undertaken
by courts and how the substantive anonymous-speech doctrine might ef-
fectively operate in the reporter–source context.

The ease with which one can speak anonymously online has created a
body of anonymous-speech litigation in which prosecutors, would-be
plaintiffs, and other litigants have sought to force the communicative enti-
ties that have information regarding a speaker’s true identity to reveal that
identity, notwithstanding the speaker’s desire to remain anonymous.318
Often, these cases arise out of anonymous comments posted on a website
dedicated to the distribution of public-affairs reporting or other informa-
tion sharing.319 In at least some cases, the websites are the online
editions of newspapers, and the anonymous postings are subscribers’ or
other readers’ comments on a news story produced by a reporter.320 An
individual who wishes to remain anonymous contributes a statement, and
then other parties take legal steps to unmask the online speaker because
they are interested in the information that she has shared—perhaps be-
cause that statement is arguably defamatory,321 gives rise to another civil
cause of action,322 or is potentially useful to a criminal investigation.

Ordinarily, the plaintiff desiring to reveal the speaker’s identity has
sued a Jane or John Doe defendant323 and then “move[d] for issuance of a
pre-service discovery subpoena on the owner of the Web site on which the

318. For an excellent overview of the legal treatment of anonymous online speech, see
Kissinger & Larsen, supra note 315.

319. See Victoria Smith Ekstrand, Online News: User Agreements and Implications for
Readers, 79 JOURNALISM & MASS COMM. Q. 602, 602 (2002) (reporting that “[o]f the nation’s
1,483 daily newspapers [in 2002], more than 1,200 had] Internet news sites,” and that the
majority had user agreements allowing “participat[ion] in interactive news forums”); Jane E.
Kirtley, Mask, Shield, and Sword: Should the Journalist’s Privilege Protect the Identity of
news organizations have experimented with ways to encourage their readers to interact with
their online news products, one of the most popular options has been to allow readers to post
comments adjacent to a news story.”).


321. Lyrissa Barnett Lidsky, Anonymity in Cyberspace: What Can We Learn from John
Doe?, 50 B.C. L. REV. 1373, 1374–76 (2009) (discussing libel suits involving anonymous
online posters and how those posters’ identities can be uncovered).

322. See, e.g., NLRB v. Midland Daily News, 151 F.3d 472, 473 (6th Cir. 1998) (adjudi-
cating the National Labor Relations Board’s suit to identify the source of an anonymous
advertisement); Salehoo Grp., Ltd. v. ABC Co., 722 F. Supp. 2d 1210, 1213 (W.D. Wash.
2010) (alleging, inter alia, trademark infringement); USA Techs., Inc. v. Doe, 713 F. Supp. 2d
901, 904 (N.D. Cal. 2010) (alleging that the anonymous poster violated the Securities Ex-
change Act of 1934).

323. Individuals who claim injuries arising from the anonymous communications on a
website are most likely to bring their cause of action against the anonymous poster and not the
website owner because section 230 of the Federal Communications Decency Act gives web-
site owners immunity from most liability for the content of third-party posts. See 47 U.S.C.
§ 230(c)(1) (2012).
offending material was posted, the anonymous poster’s Internet service provider (ISP), or both.” These cases thus parallel the reporter’s privilege context in an important way: a collector and distributor of information is subpoenaed for the identity of an anonymous speaker whose message was made public through that communicative entity. Many of the reported cases involve would-be plaintiffs seeking anonymous-online-poster identities for purposes of naming the poster as a civil defendant; some cases, however, involve parties that used subpoenas to seek the identity of an anonymous poster who is not a party and whose speech “is not alleged to have caused any harm,” but who is instead seen, like the reporters in Branzburg, as a valuable potential witness. Like the subpoenas that journalists receive in relation to confidential sources, subpoenas issued in the online-poster context are typically sweeping, requesting “all identifying information regarding the poster” and “seek[ing] the IP address of the computer from which the person posted the comments to the Web site,” along with “the information obtained from the poster when he or she registered with the Web site, which often includes the person’s name and email address.”

In the last decade, state courts and federal district courts have addressed a series of cases involving these subpoenas and have consistently applied the anonymous-speech doctrine. Very recently, federal appellate courts joined the dialogue and followed the clear pattern set by state courts and federal district courts in expressly applying the longstanding anonymous-speech jurisprudence to cases involving efforts to unmask online posters. Although there is ongoing debate among scholars and

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324. Kissinger & Larsen, supra note 315, at 16; see also id. (“Alternatively, the suit may be filed only against, or also against, the Web site or ISP, and the plaintiff serves a discovery request on those parties. In a copyright dispute, a plaintiff may obtain issuance of a pre-litigation subpoena under the Digital Millennium Copyright Act (DMCA). In criminal matters, the poster’s identity may be sought through a subpoena issued by the grand jury, prosecutor, or defendant.” (citing illustrative cases)).

325. Indeed, so close is the parallel that reporter’s privilege statutes have sometimes successfully been invoked by these communicative entities. See id. at 22.

326. Id. at 16.

327. Id.; see also id. at 25 n.12 (citing cases).

328. Jones, Media Subpoenas, supra note 8, at 382 (reporting that newsroom leaders described recent subpoenas as “fishing expedition[s]” and “sweeping in scope”).

329. Kissinger & Larsen, supra note 315, at 16 (internal quotation marks omitted) (noting that “[b]ecause many people register using fake names and non-descript e-mail addresses, the IP address is often the most valuable piece of information sought”).

330. Id.


332. See, e.g., In re Anonymous Online Speakers, 611 F.3d 653, 656–57 (9th Cir. 2010).

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courts as to the precise application of the doctrine in weighing anonymity rights against the conflicting interests presented in these cases, it has never been suggested that the First Amendment right to speak anonymously is not at stake or that this rubric is not the correct one for analyzing the propriety of these subpoenas. This admittedly adolescent but burgeoning area of anonymous-speech case law from the courts sheds important light on the viability of the proposals in this Article in two ways. First, it demonstrates the appropriateness of third-party standing in this context. Second, it highlights the substantive workability of the anonymous-speech approach.

1. Individual and Third-Party Standing in Cases of Anonymous Online Posters

The online-poster cases provide a useful framework for thinking about who should have standing to challenge subpoenas issued to communicative entities possessing information about the identities of would-be anonymous speakers. Applying the anonymous-speech doctrine in cases in which the communicative entity receives the subpoena seeking to reveal the anonymous speaker's identity, the online-poster cases have correctly noted that the interconnectedness of First Amendment liberties and the complexity of preserving the value of anonymity call for two potential avenues for asserting the constitutional right.

On the one hand, the anonymous speaker may herself assert the anonymity right as an individual speaker. Federal courts in recent cases have consistently rejected arguments that an anonymous speaker lacks standing to present a challenge when a subpoena seeking her identity is issued to her ISP. This is plainly the right result, because under the anonymous-speech doctrine, the individual-liberty interest and the "personal right in the information sought by the subpoena" belong to the anonymous speaker, who should always be able to invoke her own constitutional right to speak anonymously.

However, the case law in this online-poster area also reveals that the "trend among courts . . . is to hold that entities such as newspapers, internet service providers, and website hosts may, under the principle of jus


335. See, e.g., McVicker, 266 F.R.D. at 95; Enterline, 751 F. Supp. 2d at 787.


tertii standing, assert the rights of their readers and subscribers” who comment anonymously in their communicative spaces. A few cases illustrate particularly well the principles that would likely correspond to the analysis in the reporter–source context.

In Enterline v. Pocono Medical Center, decided by a federal district court in 2008, a local newspaper published an article about Enterline’s sexual harassment lawsuit against her employer. The article appeared in the newspaper’s online edition, where several people posted anonymous comments after the article, opining about the allegations, “with some of the posters claiming to have personal knowledge of the parties or facts at issue” in her suit. When Enterline served the newspaper a subpoena demanding the identity of the individuals who had made the anonymous posts, the newspaper declined, asserting the First Amendment anonymous-speech rights of the unnamed posters. The court agreed that the newspaper had “third-party standing to assert the First Amendment rights of individuals posting to the [n]ewspaper’s online forums.” It found that anonymous commentators “face practical obstacles to asserting their own First Amendment rights,” and that “in light of the [n]ewspaper’s desire to maintain the trust of its readers and online commentators,” the newspaper could be relied on to “zealously argue and frame the issues before the Court.” The court also found that the newspaper itself “display[ed] the adequate injury-in-fact to satisfy Article III’s case or controversy requirements because the revelation of the posters’ identities would “compromise the vitality of the newspaper’s online forums” and reduce the size of its readership in harmful ways. In other words, “the relationship between [the newspaper] and readers posting in the [n]ewspaper’s online forums” was the type of relationship that overcame the ordinary prudential bar on third-party standing and allowed the newspaper to “assert the First Amendment rights of the anonymous commentators” speaking on its site.

Another district court reached an identical result a few years later in McVicker v. King. There, McVicker issued a subpoena against a local media company in connection with his unlawful termination suit after a number of anonymous posts on the company’s local news website discussed the ac-

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McVicker, 266 F.R.D. at 95.
Enterline, 751 F. Supp. 2d at 783.
Id.
Id. at 786.
Id.; see also id. at 785–86 (noting the risks of retaliation and damage to relationships that motivated the anonymity).
Id. at 786.
Id.
Id.
Id.
Id.
266 F.R.D. 92 (W.D. Pa. 2010).
tivities of his employer in ways that McVicker believed would be relevant to impeaching the employer’s testimony. The court said that McVicker’s argument that the news site lacked standing to assert the anonymous-speech rights of the posters could be “rejected rather summarily.” Noting the same factors highlighted in Enterline—the practical obstacles faced by the holders of the right, the injuries experienced by the media company itself, and the likelihood of zealous advocacy by the media company—the court found that the news website “clearly ha[d] third-party standing to assert the First Amendment rights of individuals anonymously posting to its [local news] website.”

It is notable that in these and other cases, the courts have pointed to the closeness of the relationship between the speaker and the communicative entity seeking standing to assert the speaker’s rights—both in determining that the third party has its own injury-in-fact and in assessing the likelihood of zealous advocacy. Tellingly, courts have reached the conclusion that the relationship warrants third-party standing even though the actual relationship between an online poster and either the website on which she posts or the ISP through which she communicates is not particularly close, in terms of any mutual interest in message content or flow of information to the public. Often, the stated interest of the communicative entity is quite removed from any joint communicative or public-information goal that it might share with the speaker or even with the public. The courts focus primarily on the potential that the online newspaper or ISP will lose advertising revenue or customers rather than on any interest in expressive activity—and understandably so. After all, the speakers in the online-poster cases are chiming in with their own views after the newsgathering has occurred. They are not collaboratingly providing information to the newsgatherer’s effort but are instead speaking independently, after the fact, with information that the reporter and her newspaper have neither deemed newsworthy nor vetted in any way. Indeed, recent communications scholarship suggests that journalists’

351.   Id. at 95.
352.   Id. at 96.
353.   Id.
355.   See, e.g., Enterline, 751 F. Supp. 2d at 786 (noting that preventing the newspaper from asserting the anonymity rights of the speaker “will . . . spark[I] reduced reader interest and a corresponding decline in advertising revenues”); In re Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. at 32 (holding that an ISP had standing to assert the First Amendment rights of subscribers who made anonymous posts because if it “did not uphold the confidentiality of its subscribers, as it has contracted to do, absent extraordinary circumstances, one could reasonably predict that [its] subscribers would look to AOL’s competitors for anonymity”).
views of these posters are largely unfavorable. Although online posts are plainly capable of making some contribution to public dialogue and even potentially enhancing future newsgathering, the communications research indicates that reporters believe that the practice on the whole fosters bigoted and hateful comments, diminishing the reputation of the news organization, and is not in keeping with longstanding publication policies. Some say they would gladly do away with the practice entirely. News outlets appear to be protecting these posters out of principle—recognizing that there would be some chilling effect on future speech if anonymous online commenters were identified—and not because they see themselves as truly engaged in a joint, public-serving First Amendment activity or because

356. See, e.g., Carolyn Nielsen, Newspaper Journalists Support Online Comments, NEWSPAPER RES. J., Winter 2012, at 86, 94–98 (citing studies indicating that reporters think poorly of online commenters); Arthur D. Santana, Online Readers’ Comments Represent New Opinion Pipeline, NEWSPAPER RES. J., Summer 2011, at 66, 76 (reporting that journalists “at the country’s largest U.S. daily newspapers generally take a dim view of the online reader comments” and that “[m]any are troubled by their content”); Lola Burnham & William H. Freivogel, The Anonymous Poster: Today’s Hybrid of the Anonymous Pamphleteer and Anonymous Source?, ALL ACADEMIC, INC. 5 (Aug. 4, 2010), http://convention2.allacademic.com/one/www/www/index.php?cmd=Download+Document&key=unpublished_manuscript&file_index=2&pop_up=true&no_click_key=true&attachment_style=attachment&PHPSESSID=mht3chpm48j0/p42s5ob79q3 (quoting a New York Times lawyer as saying that anonymous posts are often “nutty” and “defamatory” (internal quotation marks omitted)).

357. Kirtley, supra note 319, at 1507 (“Anonymous ... postings encourage[] robust debate and help[] promote the First Amendment interest of ‘protect[ing] unpopular individuals from retaliation—and their ideas from suppression.’” (quoting McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995))); Ashley I. Kissinger & Katharine Larsen, Shielding Jane and John: Can the Media Protect Anonymous Online Speech?, COMM. LAW., July 2009, at 4, 4 (“Anonymous commentary—both online and off—is credited with identifying solutions for political, social, and cultural challenges; promoting unconventional ideas; and catalyzing community development and transformation.”).

358. See Santana, supra note 356, at 76 (“A vast majority [of journalists responding to the survey] said they at least occasionally got story ideas from the comments ... ”).

359. See Nielsen, supra note 356, at 98 (describing reporters’ “extreme problem” with the “level of bigotry in anonymous online comments”).

360. Kirtley, supra note 319, at 1507–08 (quoting a journalist as saying that “anonymity on the Web offends most journalists I know,” both because “their own names go on everything they write” and because it is inconsistent with decades-long practices of identifying and confirming authorship of letters to the editor (quoting Connie Schultz, Web Sites’ Anonymity Brings Out the Worst in Some Posters, PLAIN DEALER (Cleveland, Ohio), Sept. 27, 2009, http://www.cleveland.com/schultz/index.ssf/2009/09/web_sites_anonymity_brings_out.html (internal quotation marks omitted))).

361. See, e.g., Rem Rieder, No Comment: It’s Time for News Sites to Stop Allowing Anonymous Online Comments, AM. JOURNALISM REV., Summer 2010, at 2 (arguing that newspapers should “end the practice of allowing unnamed comments” because it is “flat-out wrong” and “causing headaches for news outlets”); Santana, supra note 356, at 77–78 (noting the beginning of a trend among newspapers to disallow anonymity).

362. E.g., Amy Kristin Sanders & Patrick C. File, Giving Users a Plain Deal: Contract-Related Media Liability for Unmasking Anonymous Commenters, 16 COMM. L. & POL’Y 197, 199–200 (2011) (“Unmasking anonymous commenters threatens to chill the speech of other users, who fear they might be next.”).
they envision the posters as part and parcel of their newsgathering or editorial processes.

In contrast, the relationship between the confidential source and the newspaper in the course of genuine newsgathering is significantly greater and authentically combines First Amendment interests in a symbiotic way that contributes to the larger social good. While the newspaper often knows only the IP address of the anonymous poster, the reporter almost always knows the identity of the source and has worked with her in developing the story. Journalistic standards require that the "credibility and motives of the anonymous source" be investigated before she is quoted in a published story, while no such process ordinarily occurs for online posters. And while an anonymous source "often is a whistleblower in an especially good position to have newsworthy information," providing "the most important news of the day," the poster "may be sitting in his or her pajamas spouting unsupported opinions." Thus, although it is unclear whether they will continue to seek third-party standing, the online news sites' successful assertion of that standing on behalf of speakers who are much less obviously entwined with the communicative mandate of the news organization demonstrates the propriety of third-party standing in the more persuasive context of reporters and their actual sources.

2. Substantive Application of Anonymous-Speech Doctrine in Online-Poster Cases

The anonymous-online-poster case law also highlights how the substantive application of the anonymous-speech doctrine in the context of confidential sources could operate in real-world terms and alleviates any concern that an application of strict scrutiny would lead to the overprotection of anonymity interests and the undervaluation of other important competing concerns. A brief examination of the doctrine's use in these cases shows the courts taking care to prioritize speech rights but remaining cognizant of the competing need for revealing the identity in certain contexts. In this way, the analytically and doctrinally superior anonymous-speech rubric seems to better achieve the delicate balance attempted by the qualified

363. See supra notes 266–268 and accompanying text.

364. Burnham & Freivogel, supra note 356, at 2; see also Jones, Empirical Study, supra note 8, at 651.


366. Some have speculated that it is tactically unwise for website operators and ISPs to vigorously assert the individual speaker's First Amendment rights because it may threaten their ongoing immunity under section 230 of the Communications Decency Act, as legislators see aggrieved parties left with no redress from either the publisher or the initial speaker. Kissinger & Larsen, supra note 315, at 17; see also Jennifer O'Brien, Note, Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases, 70 FORDHAM L. REV. 2745, 2757 (2002).
privilege crafted by the *Branzburg* dissent and adopted by a majority of the circuits.

As a starting proposition, the online-poster cases have correctly recognized that even when a subpoena is issued against a communicative entity that possesses the identity but obtained the information on an understanding that it would publish the speech anonymously, a protectable anonymous-speech right remains at stake.\(^1\) The courts have acknowledged in these cases that anonymity of communication is a core First Amendment right that serves critically important values—both of the individual-liberty variety\(^2\) and of the public, free-flow-of-information variety.\(^3\) In so doing, the cases cite the key precedents giving strong protection to the right of a speaker not to identify herself and applying strict scrutiny to government impositions on that right.\(^4\) But these cases have also recognized that the right to anonymous

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367. *See*, e.g., McVicker v. King, 266 F.R.D. 92, 94–95 (W.D. Pa. 2010) (noting, in the context of an effort to identify a nonparty witness, that “[t]he United States Supreme Court has consistently held that ‘an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment’” (quoting McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 342 (1995))); Enterline v. Pocono Med. Ctr., 751 F. Supp. 2d 782, 787–88 (M.D. Pa. 2008) (quoting McIntyre in the same context); Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001) (stating that the effort to unmask an anonymous online speaker implicated “[t]he right to the freedom of speech . . . enshrined in the First Amendment to the United States Constitution,” and that “[t]he anonymity of Internet speech is protected by the First Amendment”); Doe No. 1 v. Cahill, 884 A.2d 451, 456 (Del. 2005) (“It is clear that speech over the Internet is entitled to First Amendment protection. This protection extends to anonymous internet speech.” (footnotes omitted)).

368. *See*, e.g., 2TheMart.com, 140 F. Supp. 2d at 1092 (“The ‘ability to speak one’s mind’ on the Internet ‘without the burden of the other party knowing all the facts about one’s identity can foster open communication . . . ’” (quoting Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999)); Cahill, 884 A.2d at 457 (noting the potential that a plaintiff may be motivated by a desire to “subject [the anonymous speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes” (quoting Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 890 (2000))).


370. McIntyre v. Ohio Elections Comm’n, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960); see also McVicker, 266 F.R.D. at 94 (citing Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 200 (1999); McIntyre, 514 U.S. at 342; and Talley, 362 U.S. at 65) (“The United States Supreme Court has consistently held that ‘an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.’” (quoting McIntyre, 514 U.S. at 342)); 2TheMart.com, 140 F. Supp. 2d at 1092 (citing Buckley, 525 U.S. at 200; McIntyre, 514 U.S. at 357; and Talley, 362 U.S. at 65) (“A component of the First Amendment is the right to speak with anonymity.”); Cahill, 884 A.2d at 456 (“Anonymous internet speech in blogs or chat rooms in some instances can become the mod-
speech, like all First Amendment rights, is "not absolute," and that although the burden is high, the government sometimes satisfies it and may legitimately unmask a speaker who preferred anonymity.

Rightly, the cases have indicated that this may occur when the government has an interest in the identity because the anonymous speaker is legitimately a defendant in a civil suit for defamation or another cause of action, or because the anonymous speaker is an indispensable witness in a suit to which she is not a party. But courts require demonstrations that those interests in fact exist, that they are weighty enough to overcome the core First Amendment anonymity right, and that the demand for the identity is an appropriately tailored means of meeting the asserted interest. In the context of an anonymous speaker who is potentially a defendant in a civil suit, the tool for achieving this has been a careful assessment of that suit's viability, with tests "designed to sort legitimate defamation actions from..."
‘cyberslapps’—unfounded suits designed only to chill speech.”376 In cases where “expressive speech is at issue, as in defamation cases, courts tend to apply a high-burden test, and when the speech is alleged to constitute copyright or trademark infringement, courts tend to apply a low-burden test.”377 In the context of an anonymous speaker who is sought as a nonparty witness, the courts have demanded that the party seeking disclosure clear an even “higher hurdle”378 and have used a four-part test for determining whether the request for the identity is tailored to protect the speech right that is at stake:

(1) [whether] the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) [whether] the information sought relates to a core claim or defense, (3) [whether] the identifying information is directly and materially relevant to that claim or defense, and (4) [whether] information sufficient to establish or to disprove that claim or defense is unavailable from any other source.379

What results is a very close cousin to the qualified privilege set forth in the Branzburg dissent,380 although much more carefully rooted in the appropriate anonymous-speech doctrine and much better able to recognize the full range of First Amendment values at stake in a request to unmask an

other constitutionally recognized limitations on the speech of government employees is beyond the scope of this Article but worthy of exploration. It should suffice to note that it would be inconsistent with the approach taken by courts in anonymous-online-poster cases and with the overarching doctrinal insistence upon the value of anonymity for a court to unmask an anonymous source on the bare assertion that the speaker's underlying speech may be punishable.

376. Lidsky, supra note 321, at 1377; see also Cahill, 884 A.2d at 457 (describing plaintiffs' efforts to unmask anonymous speakers "even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision").

377. Kissinger & Larsen, supra note 315, at 18–19 (surveying the cases and reporting that "[t]he prevailing view" in expressive-content cases "is that the plaintiff should be required to put forth sufficient evidence to support a prima facie case or, put differently, to withstand a hypothetical summary judgment motion," and noting that, by "essentially requiring sufficient evidence to create a jury issue on the underlying claim . . . both tests are very speech protective"); see also id. at 19 (surveying the cases and noting that in cases where "the speech at issue is challenged on grounds that it infringes intellectual property rights or otherwise constitutes a business tort, many courts have applied—or at least nominally applied—either a motion-to-dismiss standard or a good cause standard").

378. McVicker, 266 F.R.D. at 95; see also 2TheMart.com, 140 F. Supp. 2d at 1095 ("[N]on-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.").

379. 2TheMart.com, 140 F. Supp. 2d at 1095, quoted in Enterline, 751 F. Supp. 2d at 787.

380. Branzburg v. Hayes, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting) (arguing that a journalist should be privileged from revealing the identity of a confidential source unless the government "(1) show[s] that there is probable cause to believe that the newsmen has information that is clearly relevant to a specific probable violation of the law; (2) demonstrate[s] that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate[s] a compelling and overriding interest in the information" (footnote omitted)).
anonymous speaker. Importantly, both tests essentially require that the anonymous-speech right be overcome as a last, rather than a first, resort. 381

All told, although the case law in the area of anonymous online posters is not completely uniform 382 and appellate courts likely will need to weigh in with clarifications on the nuances of the applicable tests, these cases illustrate the workability of the approach proposed in this Article. The balance between protecting anonymous-speech rights and recognizing the countervailing interests that often motivate subpoenas in civil suits and criminal prosecutions is a delicate one. Anonymous speech has, particularly in recent years, been portrayed as a dangerous practice and an alarming trend. 383 But the core First Amendment principles that have long called for safeguarding this speech remain critical to both the full realization of individual liberties and the free flow of public-serving information in our democracy. What is needed in the confidential-source context is a meaningful framework for recognizing those First Amendment values and a useful mechanism for determining when the countervailing interests are compelling enough and the tailoring is narrow enough to overcome the ordinary rule favoring anonymous speech. As in the anonymous-online-poster cases, courts may sometimes determine that requiring a reporter to reveal the name of her confidential source is necessary because the source is legitimately a defendant in a viable civil suit or is an indispensable witness in a suit to which she is not a party. Assuming a showing that the subpoena was issued in good faith, is directly and materially relevant to a core claim or defense, and seeks information that is unavailable from any other source, courts may strike a balance against the protection of an anonymous speaker, thereby ensuring that the important competing interests receive their appropriate weight. But the new starting point for this reporter–source inquiry—the anonymous-speech rights of the original speaker—will more carefully align the inquiry with the constitutional values at stake and ensure that the necessary balancing is performed in accordance with longstanding and constitutionally prescribed precepts.

381. See, e.g., Enterline, 751 F. Supp. 2d at 789 ("Plaintiff is able to obtain the information needed to pursue her claims through means that do not encroach on the First Amendment rights of the anonymous commentators . . . ").

382. Kirtley, supra note 319, at 1482 ("[A] variety of tests have emerged from the lower courts."); see also Kissinger & Larsen, supra note 357, at 4 ("[T]he law in this area remains in relative infancy, and media companies fighting these battles are still addressing numerous open questions.").

CONCLUSION

For the last forty years, the critically important speech dynamic between confidential sources and reporters has been governed by an inappropriately narrow standard born of a Supreme Court dissent and focused on questions of definition and degree that were overly complex from the beginning and have become increasingly intractable over time. The primary public-serving aim of the post-Branzburg reporter’s privilege is a constitutionally admirable one: to ensure the free flow of information to the public by removing disincentives for confidential sources to come forward with newsworthy material and for reporters to convey that material to the wider citizenry. But those goals can be equally, if not better, served by an already-existing body of First Amendment doctrine that also recognizes imperative individual-liberty values that are largely overlooked by the post-Branzburg approach.

The Court should recognize the deeply rooted anonymous-speech doctrine’s applicability in this area and should frame the reporter–confidential source inquiry within this rubric. Doing so will secure many benefits: It will serve the wider array of First Amendment values implicated by the situation. It will offer guidance that is more useful to reporters and sources, eliminate many of the greatest difficulties in the invocation and application of the post-Branzburg doctrine, and trigger application of well-established constitutional doctrines with which litigants have familiarity and courts have expertise. Individual speakers may assert these rights themselves, but the Court should also recognize third-party standing in reporters who promised confidentiality, who can then assert the right in response to a subpoena seeking the source’s name. As evidenced by the recent application of the anonymous-speech doctrine in the analogous setting of online posters, this approach should prove to be both practically more workable and analytically clearer than the post-Branzburg approach. Given the very real interests at stake—for anonymous sources, for reporters who work with them, and for the public that consumes the news that they produce—this positive doctrinal shift is one that the Court should be eager to effectuate.